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In the Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS JUREN and EDWARD W. CROMEY, PETITIONERS

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTION PRESENTED

Whether, under the principles set forth in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), a federal agency may issue an administrative subpoena solely for purposes of advancing a criminal investigation, as long as the agency has not yet decided to refer the matter to the Department of Justice for criminal prosecution.

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v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

The undersigned counsel, on behalf of Dennis Juren and Edward W. Cromey, petition for a writ of certiorari to review the judgment of the Temporary Emergency Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals (App. A, *infra*, 1a-3a) is not yet reported. The opinion of the D.C. Circuit (App. B, *infra*, 4a-9a) is not reported. The oral opinion of the district court (App. E, *infra*, 16a-17a) is not reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals (App. K, *infra*, 27a) was entered on September 9, 1982. A petition for rehearing was denied on September 28, 1982 (App. L, *infra*, 28a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, incorporated by Section 5(a)(1)(A) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1)(A).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in App. O, *infra*, 36a.

STATEMENT

Petitioners are vice presidents of the Tesoro Petroleum Corporation. They live and work in San Antonio, Texas. During the period from 1974 to 1981, Tesoro was the subject of a virtually continuous civil audit by the Department of Energy ("DOE") and its predecessor agencies. On July 17, 1981, apparently as part of a separate criminal investigation, DOE issued administrative subpoenas to petitioners, directing them to appear and testify in Washington, D.C. (App. N, *infra*, 32a-33a).

The subpoenas state that petitioners' testimony is sought

> in the investigation by the Department of Energy to determine the compliance of Arizona Fuels Corporation, Demenno Resources, Inc., Goldking Refinery, Ltd., Hill Petroleum, Inc., J & W Refining, Inc., Kenco Refining, Kern County Refining, Inc., Pioneer Refining, Inc., Refinery Associates, Inc., Refinery Development, Inc., San Joaquin Refining, Inc., The Tipperary Corporation, and Tesoro Petroleum Corporation, with the Mandatory Petroleum Price and Allocation Regulations, 10 C.F.R. Parts 205, 210, 211 and 212.

The subpoenas explain only that "[t]his investigation concerns purchases, sales, exchanges and processing of certain volumes of crude oil and the purchases, sales and exchanges of its refined products during the period September 1976 through December 1977" (App. N, *infra*, 32a).

Because the facts surrounding the issuance of the subpoenas strongly suggested an improper criminal purpose, and because the subpoenas were insufficiently specific to permit a reasoned judgment concerning the possibility of self-incrimination, petitioners declined to comply. Sub-

sequently, in January 1982, the government filed these subpoena enforcement actions in the United States District Court for the District of Columbia.

THE FACTUAL BACKGROUND OF PETITIONERS' SUBPOENAS

Tesoro is a major integrated refiner that was subject to DOE's Mandatory Petroleum Price and Allocation Regulations, promulgated pursuant to Section 4 of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. 753.[1] The EPAA authorized both civil and criminal penalties for regulatory violations, 15 U.S.C. 754(a), and DOE has established separate enforcement divisions to conduct civil and criminal investigations. See Economic Regulatory Administration ("ERA") ENFORCEMENT MANUAL (CCH) §§ 1.503.04, 1.503.07 (describing the functions of DOE's Program Operations Division, which is responsible for conducting civil investigations, and its Special Investigations Division, which is responsible for conducting criminal investigations).

During the seven-year DOE audit of Tesoro's compliance with EPAA regulations, DOE auditors had on-site access to virtually all of Tesoro's records relating to the company's crude oil refining and product marketing activities, including those records relating to Tesoro's processing agreements with other refiners during the period October 1976 through May 1977. DOE's Office of Special Counsel ("OSC"), which was charged with enforcement of the regulations as they applied to the 34 major refiners, apparently completed its on-site audit of Tesoro in late 1981.

While OSC was completing its civil audit in San Antonio, the Office of Special Investigations ("OSI") in Washington, D.C., began an apparently independent in-

[1] President Reagan lifted the controls applicable to crude oil and refined petroleum products on January 27, 1981. Executive Order 12287, 46 Fed. Reg. 9909 (1981). On September 30, 1981, the EPAA expired. 15 U.S.C. 760(g).

vestigation of suspected willful violations involving certain of Tesoro's processing agreements with other refiners.[2] In pursuit of this investigation, OSI issued the subpoenas *ad testificandum* that are the subject of this litigation.

Before the date for petitioners' appearances, their counsel learned that *Miranda*-type warnings were being given to witnesses testifying before OSI in connection with this investigation, and that at least one criminal referral to the Department of Justice had already occurred as a result of a similar investigation. See *United States* v. *Giant Industries, Inc.*, 4 EN. MGMT. (CCH) ¶ 26,324 (D. Ariz. 1981). Because OSC's auditors were even then conducting an intensive audit at Tesoro's headquarters, with the company's full cooperation, the issuance of formal subpoenas seeking to compel testimony from two senior executives seemed a highly unusual and unnecessary step. In an August 1981 letter to DOE, counsel for petitioner Juren expressed his concern regarding the apparent criminal purpose of the DOE subpoenas (R-14 to R-18).[3] DOE officials did not reply to this letter.

Indeed, petitioners heard nothing further regarding the subpoenas until the government began these actions. In ensuing discussions with counsel, attorneys for the government declined to provide assurances that petitioners are not "targets" of a criminal investigation. The government lawyers would say only that the planned interrogation of petitioners would involve "processing."

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[2] OSI is "[r]esponsible for the management of special investigations which center on possible willful violations of ERA regulations, and those which carry the possibility of referral to the Department of Justice for consideration of prosecution." ERA ENFORCEMENT MANUAL (CCH) § 1.503.07. Under Section 5(a) of the EPAA, 15 U.S.C. 754(a), a "willful" violation of the regulations is subject to criminal penalties.

[3] "R" refers to the record on appeal in the Temporary Emergency Court of Appeals, a copy of which has been lodged with the Clerk of this Court.

Moreover, DOE refused to permit petitioners to review in advance the documents on which they would be questioned. In response to petitioners' request for more specific information concerning the type of violation being investigated, OSI refused to go beyond the general regulatory references contained in the subpoena (R-99 to R-100).

In opposing DOE's subpoena enforcement petitions, petitioners contended that the subpoenas had been issued for an unlawful criminal purpose, and they sought discovery to establish that fact (R-168 to R-185). Petitioners also maintained that, because of DOE's failure to provide any coherent statement of the law applicable to the processing agreements regarding which they were to be questioned, they were unable intelligently to exercise or waive their privilege against compulsory self-incrimination and therefore were deprived of their Fifth Amendment rights. Finally, petitioners argued that Section 645 of the Department of Energy Organization Act ("DOEOA"), 42 U.S.C. (Supp. III) 7255, on which the government relied, did not confer jurisdiction on the district court in the District of Columbia to entertain the government's subpoena enforcement actions. Rather, petitioners argued, the actions should have been filed in the Western District of Texas, where petitioners live and work, and where the government's claims arose.

THE PROCEEDINGS BELOW

A. The District Court's Decision

Following a hearing (R-230 to R-273), the district court granted enforcement of the DOE subpoenas. The court provided little explanation of the reasons for its decision (App. E, *infra*, 16a-17a). The court noted its "deep sympathy" for the position confronting petitioners, but it concluded that the subpoenas should be enforced in light of DOE's representations that it has made neither a "criminal referral" to the Department of Justice nor a decision to make such a referral. The district court de-

nied petitioners' request for discovery regarding the purpose of DOE's investigation (App. F, *infra*, 18a-19a). The district court also denied a stay pending appeal (App. G, *infra*, 20a).

B. Petitioners' Appeals

Due to uncertainty regarding appellate jurisdiction, petitioners appeal to both the D.C. Circuit and the Temporary Emergency Court of Appeals ("TECA").[4] Petition-

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[4] Section 211(b)(2) of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. 1904 note, incorporated by Section 5(a)(1)(A) of the Emergency Petroleum Allocation Act of 1973 ("EPAA") 15 U.S.C. 754(a)(1)(A), provides that the TECA

> shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under [the ESA or the EPAA] or under regulations or orders issued thereunder.

Notwithstanding the broad language of Section 211(b)(2), which appears to track the "arising under" formula of 28 U.S.C. 1331, the reported cases establish that the TECA's jurisdiction is a limited "issue" jurisdiction that depends on whether the particular question in dispute involves some aspect of the ESA or the EPAA. See, *e.g.*, *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979); *Texaco, Inc.* v. *Department of Energy*, 616 F.2d 1193 (TECA 1979); *Gulf Oil Corp.* v. *United States Department of Energy*, 639 F.2d 766 (TECA 1981); *Spinetti* v. *Atlantic Richfield Co.*, 522 F.2d 1401 (TECA 1975); *United States* v. *Cooper*, 482 F.2d 1393 (TECA 1973).

When a case, or a segregable part of a case, does not involve the interpretation or application of one or both of those statutes, appeal from a district court's ruling lies in the appropriate circuit court of appeals rather than in the TECA. See, *e.g.*, *Bray* v. *United States*, 423 U.S. 73 (1975); *United States* v. *Uni Oil, Inc.*, 646 F.2d 946 (5th Cir. 1981), cert. denied, 102 S. Ct. 1254 (1982); *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, *supra*; *Texaco, Inc.* v. *Department of Energy*, *supra*; *Gulf Oil Corp.* v. *United States Department of Energy*, *supra*; *United States* v. *Exxon Corp.*, 628 F.2d 70 (D.C. Cir.), cert. denied, 446 U.S. 964 (1980).

As the Second Circuit observed in *Coastal States*, 604 F.2d at 185, "[p]erhaps the clearest indication that the TECA and other courts

ers challenged the jurisdiction of the district court, the improper criminal purpose of the subpoenas, and the regulatory vacillation of DOE that made it impossible for petitioners to determine rationally whether to exercise their Fifth Amendment privilege against compulsory self-incrimination. The D.C. Circuit granted a stay pending appeal and set an expedited briefing schedule (App. D, *infra*, 12a-15a).

C. The Sulton Memorandum

While the appeals were pending, petitioners acquired new evidence that substantially bolstered their claim that the DOE subpoenas were issued for an improper criminal purpose. The evidence, initially obtained by Tesoro through a Freedom of Information Act request, is a DOE file memorandum prepared by the Assistant Solicitor of OSC, Gloria Sulton (App. M, *infra*, 30a-31a). Sulton is one of the two DOE officials before whom petitioners were commended to appear in response to the disputed subpoenas. The Sulton memorandum recounts a March 1979 meeting between DOE officials and attorneys in the Criminal Division of the Department of Justice. In addition to Sulton, the DOE officials present at the meeting included

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of appeals regard the TECA's jurisdiction as some form of 'issue' jurisdiction is the development of a system of bifurcated appeals from unitary judgments" (citing cases).

Of course, disputes have arisen concerning the proper characterization of particular issues. The present case involved issues concerning the district court's jurisdiction, the criminal nature of DOE's investigation, and petitioners' Fifth Amendment privilege against compulsory self-incrimination. The government argued that all of these issues fell within the TECA's exclusive jurisdiction. But none of the issues required any interpretation or application of the ESA or the EPAA.

The jurisdictional issue, in particular, turns on another statute altogether, Section 645 of the DOEOA, 42 U.S.C. (Supp. III) 7255. Accordingly, petitioners believed that at least the jurisdictional issue, and perhaps the other two issues as well, should be decided by the D.C. Circuit. To avoid waiving any rights, petitioners appealed all three issues to both courts of appeals.

Jeffrey Whieldon and Jerome Wiener, the two persons who have filed affidavits on behalf of the government in these enforcement actions (see R-198 to R-204).

The memorandum states that the meeting concerned "approximately 18 'cluster' audits involving the Entitlement Program * * *." In particular, the meeting focused on the so-called Tesoro/Young investigation, which was characterized as "the most fully developed case" of the 18. (Petitioners have repeatedly asserted their belief that the subpoenas now in dispute were issued in connection with one or more of the other 18 "cluster" audits, and the government has never disputed that assertion.) The purpose of the March 1979 meeting, as reflected in the Sulton memorandum, was informally to brief Criminal Division officials on the Tesoro/Young matter, and to discuss "additional steps to put the case in a posture for referral" (App. M, *infra*, 30a). DOE officials thought such a discussion "would be helpful for this case as well as those still under investigation" (*ibid.*) Among the subjects discussed were "potential problems with prosecution."

The memorandum on the March 1979 meeting concludes with the following paragraph (App. M, *infra*, 31a; emphasis added):

> The last question to be answered was the nature and extent of further work by DOE before referral to DOJ. It was agreed that *depositions of key persons should be taken before a referral is made.* OSC and OGC will work together in issuing subpoenas and scheduling the taking of testimony.

The Sulton memorandum thus shows that, in an investigation which either actually encompassed or at least closely paralleled DOE's present inquiry, the government deliberately delayed referral to the Department of Justice in order to gather further evidence through DOE subpoenas. More fundamentally, the memorandum demonstrates that DOE used its subpoena power in such a case solely for purposes of a criminal investigation. For these

reasons, petitioners moved in the district court for a new hearing under Fed. R. Civ. P. 60(b). Petitioners argued that, at the very least, the Sulton memorandum shows that petitioners are entitled to some measure of discovery concerning the purposes for which the present DOE subpoenas were issued.

D. The Denial of Petitioners' Rule 60(b) Motion

The district court denied relief, noting only that DOE had represented that the Tesoro/Young investigation had been closed, and that that investigation "involved different facts and was conducted separately from the investigation in which the subpoenas in the present case were issued" (App. J, *infra*, 26a). The court did not address the petitioners' contention that the Sulton memorandum revealed DOE to have used its administrative subpoena power improperly with respect to all 18 of the so-called "cluster" audits—of which the present investigation is apparently one.

E. The D.C. Circuit's Decision

In July 1982, the D.C. Circuit ruled that the district court did have jurisdiction to hear the government's enforcement actions (App. B, *infra*, 4a-9a). The court of appeals relied exclusively on Section 645 of the DOEOA and that provision's incorporation of Section 9 of the Federal Trade Commission Act, 15 U.S.C. 49. Although acknowledging the persuasive force of petitioners' argument to the contrary, the court held that it makes no difference whether Congress, in incorporating Section 9, "referred only to the subpoena issuance authority of the administrative agency" or "explicitly incorporated both the agency authority to issue subpoenas and the judicial authority to enforce subpoenas" (App. B, *infra*, 6a).[5]

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[5] In case the Court wishes to examine petitioners' jurisdictional argument in the courts below, copies of petitioner Juren's brief and reply brief in the D.C. Circuit, together with the petition for rehearing in that court, have been lodged with the Clerk of this Court.

The D.C. Circuit declined to pass on petitioners' substantive challenges to the DOE subpoenas, holding that those matters are "EPAA issues over which the Temporary Emergency Court of Appeals has exclusive jurisdiction" (App. B, *infra*, 8a).

F. The TECA's Decision

In September 1982, the TECA upheld the DOE subpoenas (App. A, *infra*, 1a-3a). Like the district court, the court of appeals was persuaded that the subpoenas should be enforced because "DOE had made no determination to refer the case for criminal investigation" (*id.* at 2a). Without referring to any of the evidence cited by petitioners to show that the DOE subpoenas were issued as part of a criminal investigation, the TECA declared simply that petitioners' allegations of improper purpose were not "buttressed with specific facts" (*id.* at 3a).

The TECA did not address the question of the district court's jurisdiction. The court's brief opinion does not reveal whether the TECA thought (a) that the district court had jurisdiction under Section 645 of the DOEOA; or (b) that, because the D.C. Circuit had already decided the jurisdictional issue, the TECA should not address it as well; or (c) that, because the jurisdictional question turns on a statute other than the ESA or the EPAA, the TECA lacks authority to review the matter.

G. The D.C. Circuit's Grant of Rehearing

On October 5, 1982, the D.C. Circuit granted petitioners' request for rehearing on the question of the district court's jurisdiction (App. C, *infra*, 10a-11a). The court vacated its July 1982 opinion, and announced that a new decision "will issue at some future date" on the basis of the written submissions already made.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the authority of federal agencies to use their administrative subpoena power for criminal investigations. The government maintains, and the courts below held, that an agency may issue such a subpoena solely for purposes of a criminal investigation, as long as the agency has made no decision to refer the matter to the Department of Justice for prosecution. That is not the standard adopted by this Court in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978). Under *LaSalle*, the critical inquiry is whether the agency issuing a subpoena has made an "institutional commitment" to treat the matter as a criminal case. Here, there are substantial indications of such a commitment, all of which were disregarded by the courts below because of the courts' erroneous concentration on whether the agency had actually decided to refer the case to the Department of Justice. Intervention by this Court is needed to correct the lower courts' misapplication of *LaSalle*, and to ensure that the subpoena authority of DOE and other agencies is not used for purposes beyond those sanctioned by Congress.

Before turning to a further discussion of the *LaSalle* issue, the peculiar procedural context of this petition must be mentioned. The D.C. Circuit has granted rehearing, and has vacated its opinion sustaining the jurisdiction of the district court. The D.C. Circuit may well rule on rehearing that the government's enforcement actions against petitioners were not properly brought in the District of Columbia, and should have been brought in the Western District of Texas. In that event, this Court should grant the present petition, vacate the TECA's decision, and remand for reconsideration in light of the D.C. Circuit's ruling. On the other hand, if the D.C. Circuit adheres to its earlier decision and merely supports it with a new opinion, petitioners will seek review in this Court, and the Court can simultaneously

consider both the jurisdictional and substantive questions presented.

If this Court does not hold the present petition pending the outcome of the rehearing in the D.C. Circuit, undesirable consequences could ensue. If the Court were to grant this petition now, and the D.C. Circuit were subsequently to hold that the district court lacked jurisdiction, the precedential value of any decision this Court might render would be cast in doubt. This is particularly so if, as we believe, the TECA's appellate jurisdiction does not extend to issues under the DOEOA, and TECA therefore could not rule on the district court's jurisdiction (see note 4, *supra*).

If the Court were to deny this petition now, and the D.C. Circuit were subsequently to hold that the district court lacked jurisdiction, the government might well try to assert some res judicata or collateral estoppel effect of the TECA judgment in a subsequent enforcement action in the Western District of Texas. Petitioners, of course, would argue that the TECA decision could have no such effect in light of the holding on direct appeal that the district court lacked jurisdiction over the government's actions. These potential difficulties can easily be avoided, however, if this Court simply holds the present petition pending the D.C. Circuit's decision on rehearing.

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1. Returning to the reasons why this petition ultimately should be granted, we begin with the well-established proposition that an administrative subpoena may not be used solely to obtain evidence for a criminal prosecution. *United States* v. *LaSalle National Bank*, *supra*, 437 U.S. at 316; *Donaldson* v. *United States*, 400 U.S. 517, 533 (1971); *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964). As this Court explained in *LaSalle*, absent "an affirmative grant of summons authority for

purely criminal investigations," 437 U.S. at 317 n.18, an agency that issues an administrative subpoena to obtain evidence for a criminal prosecution is not exercising its subpoena power in the good-faith pursuit of a legitimate objective. *Id.* at 316 & n.18. The Court accordingly announced that it would "not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make [a criminal] referral and the [agency] merely would like to gather additional evidence for the prosecution." *Id.* at 316-317. "Similarly, the good-faith standard will not permit the [agency] to become an information-gathering agency for other departments, including the Department of Justice * * *." *Id.* at 317.

Although *LaSalle* involved a summons issued by the Internal Revenue Service, numerous courts have recognized that *LaSalle's* principles apply to other administrative agencies, including DOE. See *ICC* v. *Gould*, 629 F.2d 847 (3d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *NLRB* v. *Interstate Dress Carriers, Inc.*, 610 F.2d 99 (3d Cir. 1979); *United States* v. *Giant Industries*, 4 EN. MGMT. (CCH) ¶ 26,324 (D. Ariz. 1981) (applied to DOE); *United States* v. *Art Metal-U.S.A., Inc.*, 484 Supp. 884 (D. N.J. 1980) (applied to Inspector General of GSA). See also *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1387 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980) (SEC subpoenas must be issued in good faith, and not solely for criminal purposes).

2. Here, there are strong indications that the DOE subpoenas were issued to petitioners solely for a criminal purpose. Among these items of evidence are the following:

a. The administrative subpoenas were issued by OSI, the division within DOE that has expressly been assigned the responsibility for investigating suspected

criminal violations of DOE regulations. ERA ENFORCEMENT MANUAL (CCH) § 1.503.07.[6]

b. The subpoenas were issued after DOE's civil enforcement branch (OSC) had already completed its independent and unrelated investigation of Tesoro's compliance with the pertinent regulations.

c. OSI is seeking not simply further information, or even answers to specific questions concerning Tesoro's processing arrangements, but the personal testimony of petitioners in a way undeniably indicative of a highly focused criminal investigation. Government attorneys have announced that they will give petitioners *Miranda*-type warnings. DOE will provide no assurance that petitioners are not "targets" of a criminal investigation.

d. Although DOE has in its possession a large number of documents relevant to the transactions that are the subject of the subpoenas issued to petitioners, OSI has refused to meet with counsel to discuss the specific subject matter of the proposed interrogations or to provide petitioners with an opportunity to review in advance those documents regarding which they would be interrogated. OSI has also refused to disclose the types of violations being investigated, beyond the inscrutable references contained in the subpoenas.

e. The Sulton memorandum shows that in conducting its "Tesoro/Young investigation" DOE not only used its

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[6] The clear distinction between civil and criminal investigations within DOE, and the unquestionable focus of this investigation on suspected criminal violations, are dramatized by the recent internal reorganization of the ERA, which separated OSI entirely from the other enforcement arms. In that reorganization, DOE formalized the separation of the criminal investigatory authority reposing in OSI from the civil investigatory authority delegated to other divisions of the agency (R-102 to R-136). In anticipation of this reorganization, Mr. Rayburn Hanzlik, the Administrator of ERA, was quoted in the press describing Mr. Whieldon, the official who signed the subpoena issued to appellant Juren, as a "criminal expert" (R-138 to R-140).

subpoena power for a purely criminal investigation, but also consciously conspired with Criminal Division attorneys to delay a referral to the Justice Department until additional evidence could be gathered through administrative subpoenas. The Tesoro/Young investigation was only one of 18 entitlement "cluster" audits under investigation at the time of the Sulton memorandum; the government has not denied that petitioners' subpoenas were issued in connection with one or more of the other 18 such audits which were discussed at the March 1979 meeting. The DOE officials who participated in that meeting were precisely the same DOE officials who are now seeking to compel petitioners' testimony.

3. In response to the foregoing evidence, the government has offered only the equivocal affidavits of two DOE officials who attended the March 1979 meeting memorialized in the Sulton memorandum (R-198 to R-204). Notwithstanding the government's conceded obligation to make a prima facie showing that the subpoenas directed to petitioners did in fact have a lawful civil purpose, the affidavits do not contain any clear and unqualified statement to that effect. The affidavits appear to say only that the information sought through the subpoenas "may" be used to further a civil purpose, not that the subpoenas were actually issued with such a purpose in mind.

The affidavits contain lengthy generalized descriptions of the functions of OSI and the various possible purposes to which information gathered in a special investigation may be put. They also assert that there has been no criminal referral of, or decision to refer, this case to the Department of Justice. But, on the simple, direct, and most relevant issue of whether the disputed subpoenas were issued solely for a bona fide civil purpose, the affidavits are conspicuously silent.

4. Petitioners identified numerous indicators that the DOE subpoenas were intended solely to advance a crim-

inal investigation. The government responded with inconclusive affidavits. Yet the TECA panel found that petitioners had "presented no evidence that DOE acted improperly" (App. A, *infra*, 2a).

This ruling was possible only because the TECA, like the district court, viewed as dispositive the agency's representations that it had not yet decided to refer petitioners' case to the Department of Justice (App. A, *infra*, 2a; App. E, *infra*, 17a). That is not the critical consideration under *LaSalle*. The critical question is whether there has been an "institutional commitment" to conduct a purely criminal investigation. Here, the evidence of such a commitment was substantial. It was at least sufficient to warrant further inquiry through limited discovery regarding DOE's objectives. The courts below demurred, because they erroneously focused exclusively on whether a referral decision had been made.

LaSalle involved an IRS investigation of a taxpayer's tax liability. Unlike the investigating division of DOE, the investigating division of the IRS is not bifurcated. It is charged with uncovering both civil and criminal violations of the Internal Revenue Code. See 26 U.S.C. 7602; see also *Donaldson* v. *United States*, 400 U.S. 517, 535 (1971). Thus, in *LaSalle*, the only reliable indicator of whether an investigation was solely criminal may have been an actual decision to refer the case to DOJ.

Given the "institutional posture" of DOE, however, reliable indicators of a purely criminal investigation can be identified well in advance of an actual decision to refer. It is therefore not necessary to await a referral decision to ascertain the nature of the "institutional commitment." DOE has already made an institutional commitment, apparently with the full knowledge and approval of the Justice Department's Criminal Division, to conduct a criminal, as distinguished from a civil, investigation. At minimum, therefore, the government should

be required to make an affirmative showing that the administrative subpoenas are not being used "to expand [the government's] criminal discovery rights," or as a means of allowing the DOE "to become an information-gathering agency for * * * the Department of Justice" (437 U.S. at 317).

Both the district court and the TECA misunderstood the standard set forth in *LaSalle*. Had these courts recognized that *LaSalle* requires a judicial determination as to whether the agency has committed itself to a criminal investigation (whether performed internally or by the Department of Justice),[7] and recognized the differences in enforcement structure between DOE and the IRS, they could not have found petitioners' evidence irrelevant, or the government's representations conclusive. Those courts erred in accepting DOE's representation that no referral decision has been made as equivalent to the required showing that "the information sought will advance a civil, as distinguished from a criminal, investigation." In this case, the former simply does not establish the latter.

This Court should grant review to correct the dangerous misimpression that agency subpoenas automatically satisfy the *LaSalle* standard, as long as no referral decision has been made.

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[7] It can hardly be suggested, and the government has not attempted to suggest, that the prohibition of *LaSalle* extends only to criminal investigations conducted by DOJ. The Supreme Court's warning related to the type and purpose of the investigation being conducted, not to the identity of the agency conducting it.

CONCLUSION

The petition for a writ of certiorari should be held pending the D.C. Circuit's rehearing on the question of the district court's jurisdiction.

If the D.C. Circuit reverses, this petition should be granted, the judgment vacated, and the case remanded for reconsideration in light of the D.C. Circuit's ruling.

If the D.C. Circuit affirms, this petition should be granted.

Respectfully submitted.

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APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. DC-88

UNITED STATES OF AMERICA, PETITIONER-APPELLEE

v.

DENNIS JUREN, RESPONDENT-APPELLANT

No. DC-89

UNITED STATES OF AMERICA, PETITIONER-APPELLEE

v.

EDWARD W. CROMEY, RESPONDENT-APPELLANT

Appeals from the United States District Court for the District of Columbia

(Miscellaneous Nos. 82-0015 and 82-0016)

(Argued: August 18, 1982 Decided: September 9, 1982)

ROBERT E. MONTGOMERY, JR., Paul, Weiss, Rifkind, Wharton & Garrison, Washington, D.C., with whom Ray J. Batla, Jr., Mary Anne Sullivan, and Kevin I. MacKenzie, Hogan & Hartson, Washington, D.C., were on the brief, for Respondent-Appellant Dennis Juren.

WILLIAM E. NELSON, Nelson, Freed & Nelson, Washington, D.C., with whom Gerald D. Freed and Sherlee S. Nelson of the same firm were on the brief, for Respondent-Appellant Edward W. Cromey.

JUNE WAGONER, Department of Justice, Washington, D.C., with whom R. John Seibert of the same agency,

David L. Anderson, Economic Regulatory Administration, Washington, D.C., and David A. Engels, Department of Energy, Washington, D.C., were on the brief, for Petitioner-Appellee.

Before WRIGHT, Chief Judge, and HOFFMAN and MAXWELL, Judges.

PER CURIAM:

Appellants challenge a judgment of the District Court, Judge Gesell, requiring compliance with subpoenas requested by the Department of Energy (DOE) and denying limited discovery on the issue of the propriety of the subpoenas. Because appellants have presented no evidence that DOE acted improperly, we affirm.

DOE has broad authority to issue subpoenas *ad testificandum* under Section 206 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (1976), *as amended*, incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754(a)(1) (1976), *as amended;* Section 13(e)(1) of the Federal Energy Administration Act of 1974, 15 U.S.C. § 772(e) (1976); Section 645 of the Department of Energy Organization Act, 42 U.S.C. § 7255 (Supp. IV 1980); and 10 C.F.R. §§ 205.8 and 205.201 (1982). The agency can have these subpoenas enforced by a District Court upon an initial showing that the information sought will advance a civil, as distinguished from a criminal, investigation. *United States v. LaSalle Nat'l Bank*, 437 U.S. 298 (1978).

Judge Gesell, and then Judge Flannery on rehearing, found that DOE had met this burden of proof by presenting two affidavits from Government counsel representing that DOE had made no determination to refer the case for criminal investigation. Appellants presented no evidence challenging the accuracy of the statements made in the affidavits. Thus both judges found that appellants had failed to meet the heavy burden of showing the ex-

treme circumstances that would justify further inquiry into the propriety of the subpoenas, *see SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir.) (*en banc*), *cert. denied*, 449 U.S. 993 (1980), and so denied the motion for limited discovery.

Judge Gesell and Judge Flannery properly denied these efforts to delay enforcement of the subpoenas. Mere declarations that a subpoena was issued for an improper purpose fall short of the substantial showing respondents must make to justify discovery. *See id.; United States v. Tesoro Petroleum Corp.*, 503 F.Supp. 868, 873 (D. D.C. 1980). Unsupported allegations of bad faith and improper purpose are often made against regulatory agencies to hinder administrative investigations. Here, the unsupported allegations impugn the integrity of Government counsel. Such attempts to undermine the enforcement process should not be tolerated; allegations of bad faith and improper purpose must be buttressed with specific facts. Since appellants offer none, the order of the District Court is

AFFIRMED.*

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* Since these two cases were essentially identical with regard to their facts and the controlling law, they were consolidated for argument and decision.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 81-1271

UNITED STATES OF AMERICA, APPELLEE

v.

ANDREW E. HILL and J.E. PINKERTON, APPELLANTS

No. 82-1204

UNITED STATES OF AMERICA, APPELLEE

v.

DENNIS JUREN, APPELLANT

No. 82-1205

UNITED STATES OF AMERICA, APPELLEE

v.

EDWARD W. CROMEY, APPELLANT

[Filed Jul. 13, 1982]

Appeals from the United States District Court for the District of Columbia

(Misc. Nos. 81-197, 82-15 and 82-16).

Before WALD and EDWARDS, *Circuit Judges*, and WILLIAM J. JAMESON, *United States Senior District Judge* for the District of Montana.*

ORDER

These causes came to be heard on appeal from orders of the District Court enforcing investigatory subpoenas issued by the Department of Energy ("DOE"). The court has fully considered the briefs and oral arguments presented by the parties. There is no need for a full opinion. *See* D.C. CIR. R. 13(c).

Each of these cases stems from the investigation by DOE of industry compliance in 1976 and 1977 with DOE Mandatory Petroleum Price and Allocation Regulations. 10 C.F.R. pts. 205, 210-212. In three separate actions, the District Court ordered the enforcement of subpoenas *ad testificandum* directed to the respondents-appellants. *United States v. Hill*, 525 F. Supp. 621 (D.D.C. 1981); *United States v. Juren*, Misc. No. 82-15 (D.D.C. Feb. 17, 1982); *United States v. Cromey*, Misc. No. 82-16 (D.D.C. Feb. 17, 1982). The appellants raise both jurisdictional and substantive challenges to the District Court orders enforcing the subpoenas.

The most serious of the appellants' challenges to the District Court orders is their argument that the District Court lacked subject matter jurisdiction to enforce the subpoenas under section 645 of the Department of Energy Organization Act ("DOEOA"), 42 U.S.C. § 7255 (Supp. IV 1980). Appellants note that while section 645 of the DOEOA declares that the Secretary of Energy shall have the same subpoena powers as the Federal Trade Commission possesses under section 9 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 49 (1976), section 645 of the DOEOA makes no explicit

* Sitting by designation pursuant to 28 U.S.C. § 294(d) (Supp. IV 1980).

reference to the subpoena enforcement powers of the district courts. Thus, according to appellants, section 645 is a grant of agency power to issue subpoenas, but not a grant of judicial power to enforce the subpoenas so issued.

If we were writing on a clean slate, appellants' plain language argument might well be persuasive. That, however, is not the case. Congress has granted agencies subpoena powers by reference to section 9 of the FTC Act on numerous occasions. In some cases Congress has explicitly incorporated both the agency authority to issue subpoenas and the judicial authority to enforce subpoenas from section 9 of the FTC Act. *See* 7 U.S.C. § 2146(c) (1976); 21 U.S.C. §§ 467d, 677, 1051 (1976). On other occasions, Congress has referred only to the subpoena issuance authority of the administrative agency. *See, e.g.*, 7 U.S.C. §§ 222, 610(h), 2046 (1976); 29 U.S.C. §§ 209, 521(b) (1976); 33 U.S.C. § 944(d) (1976). Despite these differences in language, the courts have consistently interpreted a reference to section 9 of the FTC Act as incorporating both the grant of agency power to issue subpoenas and the grant of district court jurisdiction to enforce subpoenas. *See e.g., Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 199-200 & n.24 (1946) (interpreting 29 U.S.C. § 209); *General Tobacco & Grocery Co. v. Fleming*, 125 F.2d 596, 598 (6th Cir. 1942) (same); *Cudahy Packing Co. v. United States*, 15 F.2d 133, 134-35 (7th Cir. 1926) (interpreting predecessor to 7 U.S.C. § 222); *Wirtz v. National Maritime Union*, 57 Lab. Cas. (CCH) ¶ 12,651 (S.D.N.Y. 1968) (by implication) (interpreting 29 U.S.C. § 521 (a)); *Fleming v. Easton Publishing Co.*, 38 F. Supp. 677, 679 (E.D. Pa. 1941) (interpreting 29 U.S.C. § 209). Appellants, while noting the different language in the various references to section 9 of the FTC Act, have not pointed to a single case holding that the differences have any effect on the subject matter jurisdiction of the district courts.

In addition, this court has, at least implicitly, assumed the existence of subject matter jurisdiction to enforce subpoenas under section 645 of the DOEOA. In *United States v. Exxon Corp.*, 628 F.2d 70 (D.C. Cir.), *cert. denied*, 446 U.S. 964 (1980), without discussing subject matter jurisdiction, we affirmed a district court order enforcing a DOE subpoena solely on the basis of section 645.

Moreover, the Government points out that section 645 is the only provision in the DOEOA which is capable of an interpretation granting enforcement jurisdiction over subpoenas issued pursuant to any DOE function which was created in that Act and not merely transferred from a previous agency to DOE. *See* S. REP. No. 164, 95th Cong., 1st Sess. 50 (1977). If section 645 were given the limited reading suggested by appellants, it is therefore possible that some subpoenas issued by DOE would be unenforceable.[1] We do not believe that Congress intended to give DOE subpoena power that is incapable of enforcement. Nor did Congress have reason to believe, based on previous judicial interpretations of similar statutory sections, that the language it employed in section 645 might lead to that result. We therefore affirm the decision of the District Court that section 645 of the DOEOA incorporates all of section 9 of the FTC Act and provides subject matter jurisdiction for judicial enforcement of subpoenas issued pursuant to that section. *See United States v. Tesoro Petroleum Co.*, 503 F. Supp. 868 (D.D.C. 1980).

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[1] Appellant Juren has suggested 28 U.S.C. § 1331 (Supp. IV 1980) as a source of district court jurisdiction to enforce DOE subpoenas. Juren has failed to cite, and we have been unable to find, any cases construing the general grant of federal question jurisdiction as applying to petitions for enforcement of agency subpoenas. In the absence of any case law, we are unwilling to assume that § 1331, standing alone, would be sufficient to fill the gap in subpoena enforcement authority.

We also affirm the decision of the District Court that "the [DOE] inquiry is one being 'carried on' in this district for purposes of establishing jurisdiction." *United States v. Hill*, 525 F. Supp. at 623-24; *see Federal Election Commission v. Committee to Elect Lyndon La Rouche*, 613 F.2d 849 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); *United States v. Stoltz*, 525 F. Supp. 617 (D.D.C. 1981). In addition, the District Court properly ruled that it had *in personam* jurisdiction over the respondents by operation of valid extraterritorial service of process. *See FTC v. Browning*, 435 F.2d 96 (D.C. Cir. 1970); FED. R. CIV. P. 4(f).

Finally, we decline to pass upon the appellants' remaining arguments regarding the burdensomeness and the purpose of the subpoenas. The Temporary Emergency Court of Appeals has exclusive jurisdiction over all issues adjudicated by the district courts arising under the Economic Stabilization Act and the Emergency Petroleum Allocation Act ("EPAA"). 12 U.S.C. § 1904 note (1976); 15 U.S.C. § 754(a) (1976); *see Texaco Inc. v. DOE*, 616 F.2d 1193 (Temp. Emer. Ct. App. 1979); *Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979). The subpoenas that are contested in these cases were issued in order to investigate compliance with regulations promulgated under the EPAA. Unlike the District Court's jurisdiction under section 645 of the DOEOA, the burden created by and the purpose of these subpoenas are therefore EPAA issues over which the Temporary Emergency Court of Appeals has exclusive jurisdiction. *See United States v. Wickland*, 619 F.2d 75, 78 (Temp. Emer. Ct. App. 1980).

For the foregoing reasons, it is ORDERED and ADJUDGED by this court that the holdings of the District Court in these three cases with respect to subject matter jurisdiction, *in personam* jurisdiction and venue under Section 645 of the Department of Energy Organiza-

tion Act, 42 U.S.C. § 7255 (Supp. IV 1980), are AFFIRMED; it is FURTHER ORDERED that appellee's motions to dismiss for want of appellate jurisdiction are DENIED with respect to the interpretation and application of section 645 of the Department of Energy Organization Act and are GRANTED with respect to all other issues.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Misc. No. 82-00015

No. 82-1204

UNITED STATES OF AMERICA

v.

DENNIS JUREN, APPELLANT

And Consolidated Case No. 81-1205

[Filed Oct. 5, 1982]

Before: WALD and EDWARDS, Circuit Judges; JAMESON,* Senior Judge for the District of Montana

ORDER

On consideration of appellants' petition for rehearing and of the response thereto, it is

ORDERED by the Court that the petition for rehearing is granted and it is

FURTHER ORDERED by the Court that the order of July 13, 1982 be, and the same hereby is, vacated.

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* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

These cases will now be decided by the panel on the basis of the written submissions already made without further oral argument. A new decision will issue at some future date.

Per Curiam
For the Court

GEORGE A. FISHER
Clerk

By: /s/ Daniel M. Cathey
DANIEL M. CATHEY
First Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Misc. No. 82-00015

No. 82-1204

UNITED STATES OF AMERICA

v.

DENNIS JUREN, APPELLANT

[Filed Mar. 25, 1982]

Before: TAMM and GINSBURG, Circuit Judges

ORDER

On consideration of appellant's emergency motion for stay pending appeal, appellee's opposition to the motion, and appellant's reply to the opposition, it is

ORDERED by the Court that the motion for stay is granted. It is

FURTHER ORDERED by the Court, *sua sponte*, that this case be expedited. The following briefing schedule shall apply:

Appellant's brief—April 16,1982

Appellee's brief—May 3, 1982

Appellant's reply brief—May 10, 1982

Briefs shall be personally served and shall be filed in the Clerk's office no later than 4 p.m. on the indicated dates. No extensions of time will be granted. The Clerk is directed to schedule argument during the next open sitting period of the Court, May 13-June 9, 1982. The Clerk is further directed to schedule this case to be argued on the same day and before the same panel as No. 81-2171 *United States* v. *Hill*, and No. 82-1205, *United States* v. *Cromey*.

Per Curiam

For The Court

GEORGE A. FISHER
Clerk

By: /s/ Daniel M. Cathey
DANIEL M. CATHEY
First Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Misc. No. 82-00016

No. 82-1205

UNITED STATES OF AMERICA

v.

EDWARD W. CROMEY, APPELLANT

[Filed Mar. 25, 1982]

Before: TAMM and GINSBURG, Circuit Judges

ORDER

On consideration of the appellant's emergency motion for stay of order and appellee's opposition to the motion, it is

ORDERED by the Court that the motion for stay is granted. It is

FURTHER ORDERED by the Court, *sua sponte*, that this case be expedited. The following briefing schedule shall apply:

Appellant's brief—April 16, 1982

Appellee's brief—May 3, 1982

Appellant's reply brief—May 10, 1982

Briefs shall be personally served and shall be filed in the Clerk's office no later than 4 p.m. on the indicated dates. No extensions of time will be granted. The Clerk is di-

rected to schedule argument during the next open sitting period of the Court, May 13-June 9, 1982. The Clerk is further directed to schedule this case to be argued on the same day and before the same panel as No. 81-2171, *United States* v. *Hill*, and No. 82-1204, *United States* v. *Juren*.

Per Curiam

For the Court

GEORGE A. FISHER
Clerk

By: /s/ Daniel M. Cathey
DANIEL M. CATHEY
First Deputy Clerk

APPENDIX E

EXCERPT FROM TRANSCRIPT OF DISTRICT COURT HEARING BEFORE JUDGE GESELL, February 16, 1982

* * * *

[41] MR. NELSON: But in the meantime it will be a lot of harm to our clients.

THE COURT: Well, I suppose that's true in a way.

MR. NELSON: And in a very brief—

THE COURT: But the agency must realize—that's one reason I have some regard for the affidavit in spite of what Mr. Montgomery said because if these are affidavits written—tricky affidavits written to gloss over what's really going on, they'll never succeed in their criminal reference. There won't be a Judge as I know in the Federal Court that wouldn't throw them out.

MR. NELSON: Your Honor, with just a few hours' discovery we can find out whether this is or not.

THE COURT: Well, I have your point.

MR. NELSON: Thank you, Your Honor.

MR. LEHMAN: No further argument.

THE COURT: I don't want what I'm about to say to suggest that I do not have deep sympathy for the position confronting both these gentlemen, Mr. Cromey and Mr. Juren.

I believe the Court has jurisdiction. I believe Judge Joyce Green's well reasoned opinion in United States versus Tesoro Petroleum Corporation which appears at 503 Fed. Supp., 868 correctly states the law and I intend to follow it.

As far as the—there really isn't any question of [42] either subject matter having in personam jurisdiction.

The suggestion that the Court direct discovery into the motives and purposes of the agency is going to be rejected. This is a summary proceeding. I do not believe that any extraordinary circumstances have been shown that are different than those confronting other members of the public dealing with agencies that have criminal reference authority, and I accept the statements in the affidavit that no criminal referral has been made and no decision has been made to refer. The inquiry relates to the enforcement of regulations. This is not the time to test the wisdom or the validity of those—or the meaning of those regulations and therefore I think clearly the inquiry is lawful.

So I'm going to enforce the subpoena in both cases. You may submit an Order scheduling each of those men in for the second week of March at a time certain. You'll have to tender them their expenses and so forth. I'd like to have that Order in hand today in case these gentlemen wish to seek a review of the matter in the Court of Appeals and if we get it signed now there will be plenty of time to go up to the Court of Appeals if that's what you wish to do before any appearance would be necessary here.

(Whereupon, the proceedings in the above-entitled matter were concluded at 11:15 A.M.)

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 82-0015

UNITED STATES OF AMERICA, PETITIONER

v.

DENNIS JUREN, RESPONDENT

[Filed Feb. 17, 1982]

ORDER

Upon consideration of the arguments presented by counsel at the February 16, 1982 hearing held in this action, the pleadings of the parties, and the entire record herein, it is this 16th day of February, 1982,

ORDERED that Dennis Juren obey fully the Department of Energy subpoena of July 17, 1981, and appear to testify to the matters set forth therein at Washington, D.C., on the 11th day of March, 1982, and it is

FURTHER ORDERED that respondent's Motion For Leave To Conduct Discovery is denied.

/s/ Garland A. Gesell
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 82-0016

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD W. CROMEY, RESPONDENT

[Filed Feb. 17, 1982]

ORDER

Upon consideration of the arguments presented by counsel at the February 16, 1982 hearing held in this action, the pleadings of the parties, and the entire record herein, it is this 16th day of February, 1982,

ORDERED that Edward W. Cromey obey fully the Department of Energy subpoena of July 17, 1981, and appear to testify to the matters set forth therein at Washington, D.C., on the 12th day of March, 1982, and it is

FURTHER ORDERED that respondent's Motion To Permit Limited Discovery is denied.

/s/ Garland A. Gesell
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0015

UNITED STATES OF AMERICA, PETITIONER

v.

DENNIS JUREN, RESPONDENT

ORDER

Upon consideration of the motion of respondent for stay of enforcement order pending appeal and the entire record herein, it is hereby

ORDERED that respondent's motion for stay pending appeal is denied.

/s/ Garland A. Gesell
United States District Judge

March 2, 1982.

APPENDIX H

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Misc. No. 82-0015

UNITED STATES OF AMERICA, PETITIONER

v.

DENNIS JUREN, RESPONDENT

[Filed Mar. 8, 1982]

ORDER

Upon consideration of petitioner's Motion To Amend An Order, and the entire record herein, it is this 8th day of March, 1982,

ORDERED that petitioner's Motion is granted; and it is

FURTHER ORDERED that the Court's Order issued February 17, 1982, be amended to read:

> ORDERED that Dennis Juren obey fully the Department of Energy subpoena of July 17, 1981 and appear to testify to the matters set forth therein at Washington, D.C., on the 17th day of March, 1982, and it is

/s/ June Green
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 82-0016

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD W. CROMEY, RESPONDENT

[Filed Mar. 8, 1982]

ORDER

Upon consideration of petitioner's Motion To Amend An Order, and the entire record herein, it is this 8th day of March, 1982,

ORDERED that petitioner's Motion is granted; and it is

FURTHER ORDERED that the Court's Order issued February 17, 1982, be amended to read:

> ORDERED that Edward M. Cromey obey fully the Department of Energy subpoena of July 17, 1981 and appear to testify to the matters set forth therein at Washington, D.C. on the 18th day of March, 1982, and it is

/s/ June Green
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0015

UNITED STATES OF AMERICA, PETITIONER

v.

DENNIS JUREN, RESPONDENT

[Filed Mar. 18, 1982]

ORDER

Upon consideration of respondent's Motion to Amend an Order, and the entire record herein, it is this 17th day of March, 1982,

ORDERED that respondent's Motion is granted; and it is

FURTHER ORDERED that the Court's Order issued February 17, 1982, be amended to read:

> ORDERED that Dennis Juren obey fully the Department of Energy subpoena of July 17, 1981 and appear to testify to the matters set forth therein at Washington, D.C., on the 2nd day of April, 1982.

/s/ June Green
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0015

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD W. CROMEY, RESPONDENT

[Filed Mar. 18, 1982]

ORDER

Upon consideration of petitioner's Motion To Amend An Order, and the entire record herein, it is this 17th day of March, 1982,

ORDERED that petitioner's Motion is granted; and it is

FURTHER ORDERED that the Court's Order issued February 17, 1982, and amended on March 8, 1982, be amended to read:

> ORDERED that Edward M. Cromey obey fully the Department of Energy subpoena of July 17, 1981 and appear to testify to the matters set forth therein at Washington, D.C. on the 1st day of April, 1982.

/s/ June Green
United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Misc. No. 82-0015

UNITED STATES OF AMERICA, PETITIONER-APPELLEE

v.

DENNIS JUREN, RESPONDENT-APPELLANT

Misc. No. 82-0016

UNITED STATES OF AMERICA, PETITIONER-APPELLEE

v.

EDWARD W. CROMEY, RESPONDENT-APPELLANT

[Filed Jun. 3, 1982]

ORDER

This matter is before the court upon motions for a rehearing filed by the respondents Dennis Juren and Edward W. Cromey pursuant to Rule 60(b) of the Federal Rules of Civil Procedure on the ground of newly-discovered evidence.

The respondents' claim that they have recently discovered a document from the files of the Petitioner which indicates that the government intends to use the proposed depositions of the respondents for an improper purpose, namely, to build a criminal case against them.

The court has read the record in this case including the transcript of the proceeding before Judge Gesell on February 16, 1982, the motions and attached affidavits filed by the respondents and the affidavits of Jeffrey R.

Whieldon and Gloria R. Sulton executed on May 20, 1982.

The document recently unearthed by the respondents which was written in March, 1979, refers to a Tesoro/Young investigation and concerns a meeting of March 12, 1979, with certain representatives of the Department of Energy and the Department of Justice. The memorandum appears to indicate that no decision had been made to refer that matter of the Department of Justice.

The May 20, 1982, affidavits of Whieldon and Sulton state that in any event, it was decided to close that particular Tesoro/Young investigation.

The Whieldon and Sulton affidavits further assert that the aforesaid Tesoro/Young investigation involved different facts and was conducted separately from the investigation in which the subpoenas in the present case were issued.

In view of the foregoing, the respondents' motions for a new hearing are denied.

/s/ Judge Flannery
United States District Judge

APPENDIX K

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. DC-88

UNITED STATES OF AMERICA, PETITIONER-APPELLEE

v.

DENNIS JUREN, RESPONDENT-APPELLANT

No. DC-89

UNITED STATES OF AMERICA, PETITIONER-APPELLEE

v.

EDWARD W. CROMEY, RESPONDENT-APPELLANT

Before WRIGHT, Chief Judge, and HOFFMAN and MAXWELL, Judges.

JUDGMENT

These causes came to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel.

In consideration whereof, IT IS ORDERED that the judgment of the District Court is affirmed.

FOR THE COURT:

DONNA M. BOLD
Clerk

by: /s/ Stephen M. Mancuso
STEPHEN M. MANCUSO
Deputy Clerk

September 9, 1982

APPENDIX L

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. DC-88

UNITED STATES OF AMERICA, PETITIONER-APPELLEE

v.

DENNIS JUREN, RESPONDENT-APPELLANT

No. DC-89

UNITED STATES OF AMERICA, PETITIONER-APPELLEE

v.

EDWARD W. CROMEY, RESPONDENT-APPELLANT

Before WRIGHT, Chief Judge, and HOFFMAN and MAXWELL, Judges.

ORDER

Upon consideration of the Petition for Rehearing filed by Appellants (Juren and Cromey),

IT IS HEREBY ORDERED that said petition is DENIED.

IT IS FURTHER ORDERED that the mandate shall issue forthwith.

FOR THE COURT:

DONNA M. BOLD
Clerk

by: /s/ Stephen M. Mancuso
STEPHEN M. MANCUSO
Deputy Clerk

September 28, 1982

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. DC-88

UNITED STATES OF AMERICA, PETITIONER-APPELLEE

v.

DENNIS JUREN, RESPONDENT-APPELLANT

No. DC-89

UNITED STATES OF AMERICA, PETITIONER-APPELLEE

v.

EDWARD W. CROMEY, RESPONDENT-APPELLANT

Before WRIGHT, Chief Judge, and HOFFMAN and MAXWELL, Judges.

ORDER

Upon consideration of the Suggestion for Rehearing *en banc* filed by Appellants (Juren and Cromey),

IT IS HEREBY ORDERED that said suggestion is DENIED.

FOR THE COURT:

DONNA M. BOLD
Clerk

by: /s/ Stephen M. Mancuso
STEPHEN M. MANCUSO
Deputy Clerk

October 6, 1982

APPENDIX M

MEMORANDUM FOR THE FILE

FROM: Gloria Sulton
Assistant Solicitor
Office of Special Counsel

SUBJECT: Tesoro/Young Investigation
Meeting With Richard Fishkin, DOJ,
March 12, 1979, at DOJ

Present at the meeting were:

Jeffrey Whieldon and Gloria Sulton, OSC
Jerry Weiner, Alan Hechtkoph, OGC
Robert Gossin, Stan Mills and Beverly Fischetti,
Office of Enforcement
Dick Sauber, DOJ, Fraud Section

This meeting was arranged by Weiner with Wheildon's [sic] concurrence following a meeting on March 6, 1979, between OSC, OGC and OE personnel involved in the Young Entitlements "cluster" case. The purpose of the meeting was to informally brief Fishkin on the facts of the case and discuss with him additional steps to put the case in a posture for referral. Since this is the most fully developed case of approximately 18 "cluster" audits involving the Entitlement Program, it was felt that a discussion with Fishkin would be helpful for this case as well as those still under investigation.

Fischetti briefly outlined the case. Fishkin interjected questions. He was interested in what Tesoro did with the refined product and how they were priced; where jurisdiction of the case lay; potential problems with prosecu-

tion. The discussion was open and both legal and factual problems were covered.

The last question to be answered was the nature and extent of further work by DOE before referral to DOJ. It was agreed that depositions of Key persons should be taken before a referral is made. OSC and OGC will work together in issuing subpoenas and scheduling the taking of testimony.

APPENDIX N

EXHIBIT 1

Misc. A. No. 82-R-6

[SEAL]

DEPARTMENT OF ENERGY
Washington, D.C. 20461

SUBPOENA

TO: Dennis Juren

AT: TESORO PETROLEUM COMPANY
8700 Tesoro Drive
San Antonio, Texas 78266

YOU ARE HEREBY REQUIRED to appear before Thom Sacco and/or Gloria R. Sulton, or their designees, officers of the U.S. Department of Energy, at 10:00 a.m. on Friday, August 7, 1981, at 12th & Pennsylvania Avenue, Room 3109, Washington, D.C. 20461. The purpose of your appearace is to testify in the investigation by the Department of Energy to determine the compliance of Arizona Fuels Corporation, Demenno Resources, Inc., Goldking Refinery, Ltd., Hill Petroleum, Inc., J&W Refining, Inc., Kenco Refining, Kern County Refining, Inc., Pioneer Refining, Inc., Refinery Associates, Inc., Refinery Development, Inc., San Joaquin Refining, Inc., The Tipperary Corporation, and Tesoro Petroleum Corporation, with the Mandatory Petroleum Price and Allocation Regulations, 10 C.F.R. Parts 205, 210, 211 and 212. This investigation concerns purchases, sales, exchanges and processing of certain volumes of crude oil and the purchases, sales and exchanges of its refined products during the period September 1976 through December 1977.

FAILURE TO OBEY THIS SUBPOENA WILL RESULT IN REFERRAL TO A UNITED STATES DISTRICT COURT FOR ENFORCEMENT.

Issued this 17th day of July 1981, under the authority of § 206 of the Economic Stabilization Act of 1970, as amended, incorporated by § 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, amended; § 13(e)(1) of the Federal Energy Administration Act of 1974; §§ 301, 645 and 705 of the Department of Energy Organization Act and 10 C.F.R. §§ 205.8 and 205.201(a) and (b).

Signature: /s/ Jeffrey R. Whieldon
JEFFREY R. WHIELDON
Deputy Solicitor
Office of Special Counsel

[SEAL]

DEPARTMENT OF ENERGY
Washington, D.C. 20461

SUBPOENA

TO: Edward W. Cromey

AT: TESORO PETROLEUM CORPORATION
8700 Tesoro Drive
San Antonio, Texas 78266

YOU ARE HEREBY REQUIRED to appear before Thom Sacco and/or Gloria R. Sulton, or their designees, officers of the U.S. Department of Energy, at 10:00 a.m. on Wednesday, August 5, 1981, at 12th & Pennsylvania Avenue, Room 3109, Washington, D.C. 20461. The purpose of your appearance is to testify in the investigation by the Department of Energy to determine the compliance of Arizona Fuels Corporation, Demenno Resources, Inc., Goldking Refinery, Ltd., Hill Petroleum, Inc., J&W Refining, Inc., Kenco Refining, Kern County Refining, Inc., Pioneer Refining, Inc., Refinery Associates, Inc., Refinery Development, Inc., San Joaquin Refining, Inc., The Tipperary Corporation, and Tesoro Petroleum Corporation, with the Mandatory Petroleum Price and Allocation Regulations, 10 C.F.R. Parts 205, 210, 211 and 212. This investigation concerns purchases, sales, exchanges and processing of certain volumes of crude oil and the purchases, sales and exchanges of its refined products during the period September 1976 through December 1977.

FAILURE TO OBEY THIS SUBPOENA WILL RESULT IN REFERRAL TO A UNITED STATES DISTRICT COURT FOR ENFORCEMENT.

Issued this 17th day of July 1981, under the authority of § 206 of the Economic Stabilization Act of 1970, as

amended, incorporated by § 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, amended; § 13(e)(1) of the Federal Energy Administration Act of 1974; §§ 301, 645 and 705 of the Department of Energy Organization Act and 10 C.F.R. §§ 205.8 and 205.201(a) and (b).

Signature: /s/ Jeffrey R. Whieldon
JEFFREY R. WHIELDON
Deputy Solicitor
Office of Special Counsel

APPENDIX O

STATUTORY PROVISIONS INVOLVED

12 U.S.C. 1904 note (Economic Stabilization Act)

Section 206. Subpena [sic] power

The head of an agency exercising authority under this title, or his duly authorized agent, shall have the authority, for any purpose related to this title, to sign and issue subpenas for the attendance and testimony of witnesses and the production of relevant books, papers, and other documents, and to administer oaths. Witnesses summoned under the provisions of this section shall be paid the same fees and mileage as are paid to witnesses in the courts of the United States. In case of refusal to obey a subpena served upon any person under the provisions of this section, the head of the agency authorizing such subpena, or his delegate, may request the Attorney General to seek the aid of the district court of the United States for any district in which such person is found to compel such person, after notice, to appear and give testimony, or to appear and produce documents before the agency.

15 U.S.C. 754 (Emergency Petroleum Allocation Act)

(a)(1) Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
1714 MASSACHUSETTS AVENUE, N.W. WASHINGTON, D.C. 20036
TELEPHONE (202) 822-1800 CABLE LONGSIGHT, WASHINGTON

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WRITER'S DIRECT DIAL NUMBER

(202) 822-1843

November 16, 1982

Hon. Alexander L. Stevas
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Dennis Juren and Edward W. Cromey
v. United States, No. 82-739

Dear Mr. Stevas:

This case is pending on a petition for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States. Petitioners appealed the district court's judgment in the case to both the TECA and the United States Court of Appeals for the District of Columbia Circuit. On November 9, 1982, in response to a petition for rehearing, a panel of the D.C. Circuit reversed its earlier decision and held that the district court lacked jurisdiction over the government's subpoena enforcement actions.

In accordance with Rule 21.1(k)(ii) of the Rules of this Court, the D.C. Circuit's new opinion would have been included in the appendix to the pending petition for certiorari if it had been available when the petition was filed on October 28, 1982. (The earlier order of the panel, now vacated, appears in the appendix at pages 4a - 9a.) Accordingly, I am enclosing 10 copies each of this letter and of the court of appeals' new opinion. I would be grateful if you would distribute them to the Court at the same time that the petition is distributed.

Thank you very much for your assistance.

Sincerely yours,

Peter Buscemi
Counsel for Petitioner Dennis Juren

Enclosures

cc(w/enclosure): Hon. Rex E. Lee
William E. Nelson, Esq.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2171

UNITED STATES OF AMERICA

v.

ANDREW E. HILL and J.E. PINKERTON, APPELLANTS

No. 82-1204

UNITED STATES OF AMERICA

v.

DENNIS JUREN, APPELLANT

No. 82-1205

UNITED STATES OF AMERICA

v.

EDWARD W. CROMEY, APPELLANT

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appeals from the United States District Court
for the District of Columbia

(Misc. Nos. 81-197, 82-15, 82-16)

On Petition for Rehearing

Filed November 9, 1982

John D. Taurman was on the petition for rehearing and suggestion for rehearing *en banc* for appellants in No. 81-2171.

Robert E. Montgomery, Jr. and *Peter Buscemi* were on the petition for rehearing and suggestion for rehearing *en banc* for appellant in No. 82-1204.

William E. Nelson and *Sherlee S. Nelson* were on the petition for rehearing and suggestion for rehearing *en banc* for appellant in No. 82-1205.

Stanley S. Harris, United States Attorney, *David L. Anderson*, and *Charles L. Cope*, Attorneys, Department of Energy, were on the response to the petition for rehearing and suggestion for rehearing *en banc* for appellees.

Before WALD and EDWARDS, *Circuit Judges*, and WILLIAM J. JAMESON,* *United States District Judge* for the District of Montana.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: These three appeals involve challenges to District Court orders enforcing investigatory subpoenas issued by the Department of Energy

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*Sitting by designation pursuant to 28 U.S.C. § 294(d) (Supp. IV 1980).

("DOE"). Because the appellants present a common question concerning the jurisdiction of the District Court, we resolve all three appeals in this opinion. For the reasons set forth below, we hold that section 645 of the Department of Energy Organization Act ("DOEOA"), 42 U.S.C. § 7255 (Supp. IV 1980), does not confer on the District Court subject matter jurisdiction or the power of extraterritorial service of process in DOE subpoena enforcement proceedings and, accordingly, that the District Court lacked jurisdiction to enforce the subpoenas issued to the appellants.

I. BACKGROUND

Each of these cases stems from an investigation of industry compliance with the DOE's Mandatory Petroleum Price and Allocation Regulations, 10 C.F.R. pts. 205, 210-12 (1982). Andrew E. Hill and J.E. Pinkerton, appellants in No. 81-2171, are officers of the Hill Petroleum Company, a Texas corporation. On May 11, 1981, the DOE issued subpoenas *ad testificandum* directing Hill and Pinkerton to appear at the DOE office in Houston, Texas and to testify concerning "purchases, sales, exchanges and processing of crude oil and the purchase and sale of its refined product[s]" by Hill Petroleum Company and Goldberg Refining, Ltd. When Hill and Pinkerton declined to comply with the subpoenas, the Government sought enforcement in the District Court for the District of Columbia, which effected extraterritorial service of process. The Government alleged that the District Court had jurisdiction to enforce the subpoenas under section 645 of the DOEOA,[1] section 13(e) of the Federal Energy Administration Act ("FEAA"),[2] and section 206 of the Economic Stabilization Act ("ESA").[3] The Dis-

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[1] 42 U.S.C. § 7255 (Supp. IV 1980).

[2] 15 U.S.C. § 772(e) (1976).

[3] 12 U.S.C. § 1904 note (1976) (incorporated by § 5(a) of the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 754(a)(1) (1976)).

trict Court rejected appellants' several attacks on the validity of the subpoenas and ordered their enforcement, basing its jurisdiction solely on section 645 of the DOEOA. *United States v. Hill*, 525 F. Supp. 621 (D.D.C. 1981).[4]

Dennis Juren, appellant in No. 82-1204, and Edward W. Cromey, appellant in No. 82-1205, are both officers of the Tesoro Petroleum Company, a Texas corporation. On July 17, 1981, the DOE issued subpoenas *ad testificandum* directing them to appear at the DOE office in Washington, D.C. and to testify concerning transactions between their company and several other petroleum companies. Juren and Cromey refused to comply, and the Government sought enforcement of the subpoenas in the District Court for the District of Columbia. The court's process was served extraterritorially, and the Government asserted the same jurisdictional grounds as it had in *Hill*. As in *Hill*, the District Court rejected appellants' challenges to the subpoenas and ordered their enforcement, again basing its jurisdiction solely on section 645 of the DOEOA. *United States v. Juren*, Misc. No. 82-15 (D.D.C. Feb. 17, 1982); *United States v. Cromey*, Misc. No. 82-16 (D.D.C. Feb. 17, 1982); *see* Transcript of February 16, 1982 Hearing at 41-42, *reprinted in* Juren Appendix at 21-22.

The four respondents to the subpoena enforcement actions appealed the three District Court orders to this court, which originally affirmed by order. *United States v. Hill*, No. 81-2171 (D.C. Cir. July 13, 1982) (speaking order). The cases are now before the court on appellants' petition for rehearing. This court has jurisdiction to review the final orders of the District Court pursuant

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[4] Because it found that § 645 provided a sound statutory basis for both subject matter and personal jurisdiction, the District Court did not consider the sufficiency of the other statutory provisions advanced by the Government as independent jurisdictional grants. *United States v. Hill*, 525 F. Supp. at 624.

to 28 U.S.C. § 1291 (1976). *FTC v. Texaco, Inc.*, 555 F.2d 862, 873 n.21 (D.C. Cir.) (en banc), *cert. denied*, 431 U.S. 974 (1977); *see Cobbledick v. United States*, 309 U.S. 323, 330 (1940).[8]

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[8] The cases now before us raise the initial issue whether the appeals from the District Court are properly before this court or before the Temporary Emergency Court of Appeals ("TECA"). The TECA was created to hear appeals from federal district court decisions arising under the ESA. ESA Amendments of 1971, Pub. L. No. 92-210, tit. II, § 211(b), 85 Stat. 743, 749, *reprinted in* 12 U.S.C. § 1904 note (1976). The EPAA incorporated the ESA provisions for exclusive TECA review of district court orders under the ESA and the EPAA. 15 U.S.C. § 754(a)(1) (1976). This "provision thus carved out a limited exception to the broad jurisdiction of the courts of appeals over 'appeals from all final decisions of the district courts of the United States.' 28 U.S.C. § 1291." *Bray v. United States*, 423 U.S. 73, 74 (1975) (per curiam).

While the TECA's jurisdiction "of all appeals from the district courts of the United States in cases and controversies arising under" the ESA and the EPAA is exclusive, ESA, § 211(b)(2), 12 U.S.C. § 1904 note (1976), it is not all-encompassing. Rather, the TECA has jurisdiction only over issues arising under the ESA and the EPAA that have been adjudicated in the district court. *Texaco Inc. v. DOE*, 616 F.2d 1193, 1198 (Temp. Emer. Ct. App. 1979); *Coastal States Mktg., Inc. v. New England Petroleum Corp.*, 604 F.2d 179, 187 (2d Cir. 1979). Moreover, the underlying basis of the case before the court is not determinative of jurisdiction. In deciding whether it has jurisdiction, the TECA "look[s] to the nature of the issue that is presented to . . . [it] and not to the nature of the case or controversy presented below." *MGPC, Inc. v. DOE*, 673 F.2d 1277, 1281 (Temp. Emer. Ct. App. 1982).

The DOE investigations underlying the present cases concern compliance with regulations promulgated under the ESA and the EPAA. The District Court, however, based its jurisdiction to enforce the subpoenas *solely* on § 645 of the DOEOA. At least with regard to the issue of the District Court's jurisdiction under § 645, therefore, we do not believe that the TECA has appellate jurisdiction. *Texaco Inc. v. DOE*, 616 F.2d at 1195; *cf. United States v. Wickland*, 619 F.2d 75, 78 (Temp. Emer. Ct. App. 1980) (whether the DOE

II. Jurisdiction of the District Court

A. *General Principles*

1. *Subject Matter Jurisdiction*

We begin our analysis of the District Court's authority to enforce subpoenas issued by the DOE with the accepted premise that federal courts must "scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

> It is a principle of first importance that the federal courts are courts of limited jurisdiction. . . . They are empowered to hear only those cases that (1) are within the judicial power . . . , and (2) that have been entrusted to them by a jurisdictional grant by the Congress.
>
> . . . The presumption is that a federal court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists.

13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3522 (1975) (footnotes omitted). It is clear, moreover, that "[t]he fact that Congress has legislated in a specific area, without more, does not empower a federal court to adjudicate matters arising from

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can be estopped from enforcing subpoena power conferred by the EPAA is an issue involving the EPAA over which the TECA has exclusive jurisdiction). Thus, as the Government concedes, we may consider on appeal whether § 645 of the DOEOA confers on the District Court subject matter jurisdiction and the power of extraterritorial service of process in DOE subpoena enforcement proceedings. Because we conclude that it does not, we need not decide whether the other issues raised by the appellants are properly before this court or are within the TECA's exclusive jurisdiction. On this basis, we deny the Government's motion to dismiss. *See United States v. Juren*, No. DC-88, slip op. (Temp. Emer. Ct. App. Sept. 9, 1982) (affirming district court order rejecting appellants' substantive challenges to the DOE's subpoenas).

or requiring an interpretation of that legislation. Rather, a specific grant of subject matter jurisdiction must exist before a federal tribunal may so act." *Murray v. Murray*, 621 F.2d 103, 107 (5th Cir. 1980). Unless district courts have been accorded subject matter jurisdiction to enforce DOE subpoenas under section 645 of the DOEOA, the trial court was without authority to act as it did in these cases.

2. *Personal Jurisdiction*

Even if the District Court possessed subject matter jurisdiction under section 645 or some other statutory provision, *see* Part II.D.1. *infra*, that would not end our inquiry. The court must also have had personal jurisdiction over the appellants to enforce the DOE subpoenas against them. On this latter point, there is no doubt that "[a]part from specific exceptions created by Congress the jurisdiction of the district courts is territorial." *Georgia v. Pennsylvania Railroad*, 324 U.S. 439, 467 (1945). Personal jurisdiction in a civil suit implies, among other things, either voluntary appearance by the defendant or valid service of process on him at the place where he may be found. *See Robertson v. Railroad Labor Board*, 268 U.S. 619, 622 (1925).

Congress, of course, could authorize suits under federal law in any inferior federal tribunal, *id.* at 622; *Hanes Supply Co. v. Valley Evaporating Co.*, 261 F.2d 29, 34 (5th Cir. 1958); *see* U.S. CONST. art. III, § 1, and provide that the process of every district court shall run into every part of the United States, *United States v. Union Pacific Railroad*, 98 U.S. 569, 604 (1878); *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838). But where Congress has not done so, rule 4(f) of the Federal Rules of Civil Procedure normally confines the geographical area in which a district court's process can be served to "the territorial limits of the state in which the district court is held," FED. R. CIV. P. 4(f); service outside the

state is permitted only "when authorized by a statute of the United States" or by some other specific provision of the Federal Rules, *id.; see Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-46 (1946).[6]

To assess the propriety of the District Court's exercise of enforcement jurisdiction on the basis of extraterritorial service of process, therefore, we must determine whether Congress has created a "specific exception" to the usual rule.[7] Such exceptions may be created either explicitly[8] or implicitly. In *FTC v. Browning*, 435 F.2d 96 (D.C. Cir. 1970), for example, this court held that the third paragraph of section 9 of the Federal Trade Commission Act ("FTC Act"),[9] impliedly authorized extraterritorial service of process in proceedings to enforce in-

---

[6] Rule 4(f) governs "proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings." FED. R. CIV. P. 81 (a)(3).

[7] *See* 3 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 21.02[2][a] (1982). Neither the Government nor the District Court suggested that the Federal Rules of Civil Procedure authorize extraterritorial service of process in DOE subpoena enforcement actions. The exception for service authorized "by these rules" "incorporates the service provisions found in Rules 4(d)(7), 4(e), and 4(i) and thus makes it clear that service made pursuant to state law is not confined to the territorial limits of the state when state law permits extraterritorial service." 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1126 (1969). Since there is no argument that service of process in these cases was grounded in the District of Columbia Code, we need not consider this exception.

[8] *See, e.g.*, 15 U.S.C. §§ 5, 25 (1976); 28 U.S.C. §§ 1391(e), 2321(c), 2413 (1976 & Supp. IV 1980).

[9] 15 U.S.C. § 49 (1976).

vestigative subpoenas issued by the Federal Trade Commission ("FTC" or "Commission").[10] But if no exception can be found in the statute under which the District Court acted, its service of process on appellants was invalid, and it lacked personal jurisdiction to enforce the DOE's subpoenas.[11]

---

[10] *See also FTC v. Jim Walter Corp.*, 651 F.2d 251, 254-55 (5th Cir. 1981); *Federal Election Comm'n v. Committee to Elect Lyndon LaRouche*, 613 F.2d 849, 858-62 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

The *Browning* court offered three justifications for its decision. The opinion noted, first, that since the third paragraph of § 9 limited the place of suit for enforcement of FTC subpoenas to the jurisdiction in which the investigation was being carried on, it was necessary to imply authority for extraterritorial service of process "to effectuate the purpose of the regulatory scheme." *FTC v. Browning*, 435 F.2d at 100. Since we find that § 645 does not incorporate the third paragraph of § 9, this argument has no relevance in these cases. *See* note 12 *infra*.

The second rationale underlying the decision in *Browning* emphasized the national character of the FTC's investigations. Because enforcement proceedings against similarly situated individuals present identical legal issues, "[i]t makes for uniformity in the application of the law and economy of judicial administration to center the enforcement proceedings in a single court." 435 F.2d at 100. Finally, the court found some support for implying a grant of authority for extraterritorial service of process in the legislative history of the FTC Act. *Id.* at 100-01. Neither of these arguments justifies implying judicial authority for extraterritorial service of process under the DOEOA. *See* note 17 & Part II.D.2. *infra*.

[11] "In the absence of authority under a federal statute, service outside the forum state will be quashed unless objections to service or venue requirements are waived or the service is otherwise permissible under Rule 4(d)(7), Rule 4(e), or Rule 4(i)." 4 C. WRIGHT & A. MILLER, *supra* note 7, at § 1125 (footnotes omitted). The appellants herein cannot be said to have waived their objections to the District Court's lack of personal jurisdiction, improper venue, or insufficiency of service of process. *See* FED. R. CIV. P. 12(h)(1); 5 C. WRIGHT & A. MILLER, *supra* note 7, at § 1391.

B. *Section 645*

In each of these cases, the District Court relied solely on section 645 of the DOEOA as the statutory basis for both subject matter and personal jurisdiction. That section grants the Secretary of Energy the same power *to issue subpoenas* as the FTC possesses under section 9 of its enabling legislation. Section 645 states:

> For the purpose of carrying out the provisions of this chapter, *the Secretary*, or his duly authorized agent or agents, *shall have the same powers and authorities as the Federal Trade Commission under section 49 of title 15* with respect to all functions vested in, or transferred or delegated to, the Secretary or such agents by this chapter.

42 U.S.C. § 7255 (Supp. IV 1980) (emphasis added). The relevant portions of section 9 of the FTC Act read as follows:

> [*T*]*he Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all . . . documentary evidence relating to any matter under investigation. . . .*
>
> Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And *in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.*
>
> *Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may*, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation *issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question*; and any failure to obey such order of the

> court may be punished by such court as a contempt thereof.

15 U.S.C. § 49 (1976) (emphasis added).

In *United States v. Tesoro Petroleum Corp.*, 503 F. Supp. 868 (D.D.C. 1980), the District Court found that the authority accorded to the Secretary of the DOE by section 645 may be read to imply a grant of coextensive extraterritorial jurisdiction to district courts petitioned to enforce DOE subpoenas. In so doing, the court ruled that the DOEOA incorporated not only the first and second paragraphs of section 9 of the FTC Act, which outline the powers of the Commission, but also paragraph three, the provision granting extraterritorial *subpoena enforcement* authority to district courts in jurisdictions wherein the Commission is conducting its investigations. *Id.* at 871-72.[12] In each of the cases now before us, the

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[12] To the best of our knowledge, no other court has held that § 645 confers on the district courts either subject matter jurisdiction or the power to serve process extraterritorially. *But see United States v. Stoltz*, 525 F. Supp. 617 (D.D.C. 1981) (by implication).

The three bases on which the *Tesoro Petroleum* court rested its conclusion are easily undermined. The court found, first, that because the DOEOA incorporated the language of the FTC Act and did not merely model that Act, "[i]t would be logical to imply . . . a congressional intent to give DOE the same powers as those given to the FTC." *United States v. Tesoro Petroleum Corp.*, 503 F. Supp. at 871. By ignoring the possibility that Congress drew a distinction between the power of the Secretary and the power of the district courts, this argument simply assumes its conclusion.

The second reason offered by the *Tesoro Petroleum* court to justify its conclusion was that the "fragmentation" of investigations resulting from a refusal to imply authority for extraterritorial service of process "would frustrate an agency's purpose of maintaining coherent, nationwide supervision over the subject matter of its regulatory efforts." *Id.* This concern is more properly addressed to Congress than to the courts, and an examination of the provisions regarding subpoena enforce-

District Court specifically relied on this holding in *Tesoro Petroleum* to conclude that section 645 conferred on it both subject matter and personal jurisdiction to enforce the DOE subpoenas. We cannot agree.

The interpretation of section 645 must begin, of course, with the statutory language that Congress used to express its intent.[13] Notably, the section's plain language does not support the Government's claim that it confers jurisdiction on the District Court.[14] On its face, section 645 declares only that "the Secretary . . . shall have the same powers and authorities [to issue subpoenas] as the

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ment in the statutes incorporated by the DOEOA suggests that Congress has yet to recognize the need for extraterritorial enforcement authority in this area. *See* note 40 *infra*.

The *Tesoro Petroleum* court's final rationale—that extraterritorial service of process was necessary to avoid "the situation where a district court would have exclusive jurisdiction over an enforcement proceeding and yet be deprived of the authority to compel the attendance of the respondent absent his voluntary entrance into the district," *id.*—is equally unavailing. This argument has absolutely no force in this context. Although the third paragraph of § 9 of the FTC Act can be read as limiting the courts in which subpoena enforcement proceedings can be brought, *FTC v. Browning*, 435 F.2d at 100; *accord FTC v. Jim Walter Corp.*, 651 F.2d 251, 254 (5th Cir. 1981), that limitation applies to the DOE only if § 645 incorporates *all* of § 9. Since we find that § 645 does not incorporate the third paragraph of § 9, we give no weight to this argument.

[13] *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

[14] The fact that § 645 incorporates the language of § 9 of the FTC Act, *see United States v. Tesoro Petroleum Corp.*, 503 F. Supp. at 871, does not tell us whether it incorporates *some* or *all* of that language. "The reference terminology may be either specific or general in nature, and it may extend to an entire statutory scheme, or to only one statute in a scheme, or to only one provision or section of a statute." Sentell, *"Reference Statutes"—Borrow Now and Pay Later?*, 10 GA. L. REV. 153, 154 (1975).

Federal Trade Commission." At least since *ICC v. Brimson*, 154 U.S. 447, 485 (1894), federal courts have drawn a sharp distinction between agency power to *issue* subpoenas and judicial power to *enforce* them. *E.g.*, *United States v. Exxon Corp.*, 628 F.2d 70, 77 (D.C. Cir.) (per curiam), *cert. denied*, 446 U.S. 964 (1980); *United States v. Bell*, 564 F.2d 953, 959 (Temp. Emer. Ct. App. 1977); *see* L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 115-17 (1965).[16] Section 645, in short, makes no reference whatsoever to the power of courts to enforce subpoenas,[18] and its plain language thus provides no basis for inferring a special congressional grant of extraterritorial jurisdiction to enforce DOE subpoenas.[17]

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[16] This "[b]ifurcation of the power, on the one hand of the agency to issue subpoenas and on the other hand of the courts to enforce them, is an inherent protection against abuse of subpoena power." *United States v. Bell*, 564 F.2d at 959; *accord United States v. Security State Bank & Trust*, 473 F.2d 638, 641 (5th Cir. 1973); F. COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 129-31 (1951).

[18] In its arguments to this court, the Government has confused the DOE's power to seek enforcement of its subpoenas and the courts' power to grant or deny that enforcement. The second paragraph of § 9 of the FTC Act, which all parties agree is incorporated by reference in § 645 of the DOEOA, states in part: "[I]n case of disobedience to a subpoena *the Commission may invoke the aid of any court of the United States* in requiring the attendance and testimony of witnesses and the production of documentary evidence." 15 U.S.C. § 49 (1976) (emphasis added). This sentence grants the agency *standing* to seek enforcement of its subpoenas, but it does not confer *jurisdiction* on the federal courts. Rather, the phrase "any court of the United States" must be interpreted as "any court of competent jurisdiction." *See Robertson v. Railroad Labor Bd.*, 268 U.S. at 627.

[17] The legislative history of § 645 also provides no support for the Government's position that the section was intended as both a grant of subpoena issuance authority and a grant of extraterritorial subpoena enforcement jurisdiction. Section

The absence of any language in section 645 specifically incorporating the jurisdictional provisions of section 9 of the FTC Act is especially telling when section 645 is compared with other statutory grants of subpoena power. On a number of occasions, Congress has conferred subpoena issuance authority on administrative agencies by reference to the FTC's powers under section 9 of the FTC Act.[18] In four of these statutes, Congress explicitly

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645 of the DOEOA originated in the Senate bill to establish the DOE. S. 826, 95th Cong., 1st Sess. § 605 (1977). The Senate Report commented:

> This section grants the Secretary the power to issue a subpena in carrying out the provisions of this act. The power is the same as those granted to the Federal Trade Commission in section 9 of the Federal Trade Commission Act, and applies to all responsibilities vested in the Secretary by this act.

S. REP. No. 164, 95th Cong., 1st Sess. 50, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 854, 904 [hereinafter cited as S. REP. No. 164]; *see also* S. REP. No. 367, 95th Cong., 1st Sess. 96 (1977) (Conference Report). The Senate Report, like § 645 itself, thus addresses only the Secretary's power to *issue a subpoena* and makes no reference to any legislative intent to confer enforcement jurisdiction on the district courts.

[18] 7 U.S.C. § 222 (1976) (Packers and Stockyards Act of 1921); 7 U.S.C. § 610(h) (1976) (Agricultural Adjustment Act); 7 U.S.C. § 2046 (1976) (Farm Labor Contractor Registration Act of 1963); 7 U.S.C. § 2146(c) (1976) (Animal Welfare Act Amendments of 1976); 15 U.S.C. § 756(b) (1976) (FTC power under the EPAA); 21 U.S.C. § 467d (1976) (Poultry Products Inspection Act); 21 U.S.C. § 677 (1976) (Meat Inspection Act); 21 U.S.C. § 1051 (1976) (Egg Products Inspection Act); 26 U.S.C. § 5274 (1976) (Excise Tax Technical Changes Act of 1958); 27 U.S.C. § 202(c) (1976) (Federal Alcohol Administration Act); 29 U.S.C. § 177(c) (1976) (Labor Management Relations Act of 1947); 29 U.S.C. § 209 (1976) (Fair Labor Standards Act of 1938); 29 U.S.C. § 308(e) (1976) (Welfare and Pension Plans Disclosure Act); 29 U.S.C. § 521(b) (1976) (Labor-Management Reporting and Disclosure Act of 1959); 29 U.S.C. § 835(a)(3) (Supp. IV 1980) (Comprehensive Employment and

incorporated both the agency authority to issue subpoenas, found in the first two paragraphs of section 9 of the FTC Act, and the judicial authority to enforce subpoenas, found in the third paragraph of section 9.[19] These statutes clearly evince Congress' awareness of the distinction between *subpoena issuance* and *subpoena enforcement* and its knowledge of what language to use when it wishes to incorporate both the issuance and enforcement powers found in section 9 of the FTC Act. Congress' failure to use that language in section 645 of the DOEOA, like the plain language of the section, indicates that it did not intend section 645 to confer on district courts subject matter jurisdiction or the power of extraterritorial service of process in DOE subpoena enforcement proceedings.[20]

Training Act Amendments of 1977); 29 U.S.C. § 1134(c) (1976) (Employee Retirement Income Security Act of 1974); 33 U.S.C. § 944(d)(3) (1976) (Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972); 50 U.S.C. app. § 1983(b) (1976) (Evacuation Claims Act).

[19] *See* 7 U.S.C. § 2146(c) (1976); 21 U.S.C. §§ 467d, 677, 1051 (1976).

The language of the Animal Welfare Act is illustrative. It provides that a number of provisions, including §§ 9 and 10 of the FTC Act, "are made applicable to the jurisdiction, powers, and duties of the Secretary in administering and enforcing the provisions of this chapter and to any person, firm, or corporation with respect to whom such authority is exercised." It then states that "[t]he powers conferred by said sections 49 and 50 of title 15 on the district courts of the United States may be exercised for the purposes of this chapter by any district court of the United States." 7 U.S.C. § 2146(c) (1976).

[20] *Cf. Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979) (rejecting implied cause of action under § 17(a) of the Securities Exchange Act in part because "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734 (1975) (confining relief under § 10(b) of the Securities Exchange Act to actual purchasers or sellers in part for the same reason).

C. *Judicial Constructions of Similar Statutes*

The Government has referred us to judicial interpretations of several sections of the United States Code that grant subpoena powers by reference to section 9 of the FTC Act, and our research has disclosed other cases interpreting those sections as conferring enforcement jurisdiction on the federal courts. When examined closely, however, these cases supply little or no support for the proposition that section 645 of the DOEOA authorizes extraterritorial service of process in DOE enforcement proceedings.

First, almost without exception, the courts that have stated or implied that provisions incorporating section 9 of the FTC Act confer jurisdiction on the federal courts either were not faced with a jurisdictional challenge or did not discuss the issue.[21] Second, incorporation of the paragraph of section 9 that confers extraterritorial enforcement jurisdiction was not essential to the result

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[21] *See, e.g., Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 199-200 & n.24 (1946); *Donovan v. Mehlenbacher*, 652 F.2d 228, 230 (2d Cir. 1981); *Goldberg v. Truck Drivers Local Union No. 299*, 293 F.2d 807, 810 & n.3 (6th Cir.), *cert. denied*, 368 U.S. 938 (1961); *see also Cudahy Packing Co. v. Holland*, 315 U.S. 357, 359-60 (1942); *United States v. Exxon Corp.*, 628 F.2d at 73-76; *United States v. Marshall Durbin & Co.*, 363 F.2d 1, 4-5 (5th Cir. 1966); *Durkin v. Fisher*, 204 F.2d 930, 931 & n.1 (7th Cir.), *cert. denied*, 346 U.S. 897 (1953); *Mississippi Rd. Supply Co. v. Walling*, 136 F.2d 391, 394 (5th Cir.), *cert. denied*, 320 U.S. 752 (1943); *Wirtz v. National Maritime Union*, 57 Lab. Cas. (CCH) 21,504, 21,505 (S.D.N.Y. 1968); *Freeman v. Canned Dairy Prods., Inc.*, 265 F. Supp. 95, 97 & n.1 (W.D. Pa. 1966); *Freeman v. Brown Bros. Harriman & Co.*, 250 F. Supp. 32, 33-34 (S.D.N.Y.), *aff'd*, 357 F.2d 741 (2d Cir.) (per curiam), *cert. denied sub nom. Meyer Zausner Sales, Inc. v. Freeman*, 384 U.S. 933 (1966); *United States v. Tyson's Poultry, Inc.*, 216 F. Supp. 53, 56 (W.D. Ark.), *appeal dismissed*, 319 F.2d 860 (8th Cir. 1963) (per curiam); *Fleming v. Cudahy Packing Co.*, 41 F. Supp. 910, 914 (S.D. Cal. 1941).

in any of the cases in which a jurisdictional issue was presented and resolved.[22] We have found no case in which an objection based on the agency's failure to bring its subpoena enforcement action in the *proper court* was rejected on the basis of the incorporated provisions of section 9 of the FTC Act; rather, the burden of the jurisdictional challenge in each of these cases was that *no court* was empowered to enforce the agency's subpoenas. *See, e.g., Cudahy Packing Co. v. United States*, 15 F.2d 133, 134-35 (7th Cir. 1926).

Even absent these problems, we would find it impossible to glean much support from the decided cases. In several of the cases, the court's conclusion that it had jurisdiction was based not on a general incorporation of section 9, but on another provision of the incorporating

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[22] *See, e.g., Cudahy Packing Co. v. United States*, 15 F.2d 133, 134-35 (7th Cir. 1926); *Wirtz v. Local No. 502, Int'l Hod Carriers & Common Laborers Union*, 217 F. Supp. 155, 155-56 (D.N.J. 1962); *Fleming v. Easton Pub. Co.*, 38 F. Supp. 677, 679 (E.D. Pa. 1941); *Fleming v. Lowell Sun Co.*, 36 F. Supp. 320, 323-24 (D. Mass. 1940), *vacated*, 120 F.2d 213 (1st Cir. 1941), *aff'd by an equally divided Court sub nom. Holland v. Lowell Sun Co.*, 315 U.S. 784 (1942) (per curiam).

To the best of our knowledge, none of these cases involved an attempt to enforce an administrative subpoena outside of the district where the respondent was found. District court jurisdiction, therefore, did not depend on the incorporation of the third paragraph of § 9 of the FTC Act. Incorporation of the second paragraph of § 9 gave Department of Labor officials standing to sue, *see* note 16 *supra*, and the general grant of federal question jurisdiction extant at the time provided a fully sufficient basis for the district courts' actions, *see, e.g.*, 28 U.S.C. § 41(1) (1940).

These cases, and others interpreting § 9 of the Fair Labor Standards Act ("FLSA"), *see, e.g., Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 199-200 (1946); *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 359-60 (1942), can be discounted for another compelling reason as well. When Congress enacted the FLSA in 1938, it had not enacted any other statute explicitly incorporating both the subpoena issu-

statute,[23] and every other decided case rests on an incorporating statute that is arguably broader than section 645 of the DOEOA.[24] The inferences that the Government draws from the case law, moreover, are flatly contradicted by a number of the cases it cites.[25]

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ance power and the subpoena enforcement power of § 9 of the FTC Act. Thus, a court interpreting § 9 of the FLSA might reasonably have assumed that Congress intended to incorporate the entirety of § 9 of the FTC Act.

[23] *See, e.g., Newmark & Co. v. Wirtz*, 330 F.2d 576, 578 (2d Cir. 1964).

[24] *Compare* 42 U.S.C. § 7255 (Supp. IV 1980) ("the Secretary . . . shall have the same powers and authorities as the [FTC] under" § 9) *with* 7 U.S.C. § 222 (1976) (§ 9 is "made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this chapter and to any person subject to the provisions of this chapter"); 7 U.S.C. §§ 610(h), 2046 (1976); 29 U.S.C. §§ 209, 521(b) (1976). Congress' desire to incorporate only the powers granted to the Secretary is more apparent on the face of § 645 of the DOEOA, the narrowest statute it has ever drafted incorporating any part of § 9 of the FTC Act, than on the face of any of the statutes that courts have previously interpreted.

[25] In *Walling v. La Belle S.S. Co.*, 148 F.2d 198 (6th Cir. 1945), for example, the court discussed the incorporation of § 9 of the FTC Act in § 9 of the FLSA: "The applicable provisions in substance provide that . . . [i]n the case of subpoena disobedience, the Commission may invoke the aid of *any court of the United States of competent jurisdiction*, to require the attendance and testimony of witnesses and the production of documentary evidence." *Id.* at 199 (emphasis added). If the court believed that the FLSA had incorporated § 9 of the FTC Act in its entirety, it most likely would have indicated that enforcement could only be sought from courts within the jurisdiction of which the Commission was conducting its investigation. *FTC v. Browning*, 435 F.2d at 100 (discussed in note 10 *supra*). *See also General Tobacco & Grocery Co. v. Fleming*, 125 F.2d 596, 598 (6th Cir. 1942) (same as *La Belle*); *Serr v. Sullivan*, 270 F. Supp. 544, 545 (E.D. Pa. 1967) (not discussing jurisdiction, but indicating only that 27 U.S.C. § 202(c) "incorporates that portion of

We conclude, therefore, that, for all practical purposes, we are writing on a clean slate. We find little in the case law on which the Government relies to guide us to the reading of section 645 that it advocates; certainly nothing in those cases requires us to conclude that section 645 incorporates the third paragraph of section 9 of the FTC Act and thus confers subject matter jurisdiction or authorizes extraterritorial service of process. Bereft of such authority, we turn to fundamental principles of civil procedure and statutory construction, which amply support our holding that section 645 does not confer on the District Court subject matter jurisdiction or the power of extraterritorial service of process in DOE subpoena enforcement proceedings.

D. *Enforceability of DOE Subpoenas*

In light of the oral arguments and written submissions in these cases, we discern two grounds upon which our reading of section 645 of the DOEOA might be questioned. First, the Government appears to suggest that our construction of section 645 would prevent the DOE from obtaining judicial subpoena enforcement in investigations of matters newly assigned to it by the DOEOA,[26] and thus render its subpoena powers meaningless.[27] Second, the Government argues that even if the district

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the [FTC Act] which authorizes the Commission *to issue subpoenas*") (emphasis added), *aff'd*, 390 F.2d 619 (3d Cir. 1968) (per curiam).

[26] *See* S. REP No. 164, *supra* note 17, at 50, 1977 U.S. CODE CONG. & AD. NEWS at 904.

[27] *See Federal Maritime Comm'n v. New York Terminal Conference*, 262 F. Supp. 225, 231 (S.D.N.Y. 1966) ("the [subpoena] power itself would be a nullity without the ability to obtain judicial enforcement"), *aff'd*, 373 F.2d 424 (2d Cir. 1967); *cf. FTC v. Manager, Retail Credit Co., Miami Branch Office*, 515 F.2d 988, 994 (D.C. Cir. 1975) ("The presumption against interpreting a statute in a way which renders it ineffective is hornbook law.")

courts could establish their subject matter jurisdiction without relying on the incorporation of the FTC Act's jurisdictional provisions, the unavailability of extraterritorial service of process would force the DOE to institute enforcement proceedings in many different judicial districts and frustrate its statutory mission. We address these contentions in order.

1. *Subject Matter Jurisdiction Under 28 U.S.C. §§ 1331, 1337(a), and 1345*

Although statutes creating administrative subpoena powers often contain provisions specifically authorizing judicial enforcement orders,[28] the Judicial Code's general jurisdictional provisions, 28 U.S.C. §§ 1331, 1337(a), 1345 (1976 & Supp. IV 1980), render such specificity unnecessary.[29] We have found no cases squarely holding that these provisions empower the district courts to enforce administrative subpoenas;[30] nevertheless, we have

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[28] *See, e.g.*, 15 U.S.C. § 754(a)(1) (1976) (incorporating § 206 of the ESA, 12 U.S.C. § 1904 note (1976)); 15 U.S.C. § 772(e) (1976).

[29] *Cf.* B. MEZINES, J. STEIN & J. GRUFF, *supra* note 7, at § 21.02[2][a] (footnotes omitted):

> On occasion, agency subpoena power is not specifically spelled out in the statute. Instead, the courts have interpreted other powers granted the agency (such as rulemaking) as giving rise to an implied subpoena power. In such instances, district courts have exercised jurisdiction in enforcement proceedings, and it is to be presumed that such action is proper, although the issue of subject matter jurisdiction has not specifically been raised in such a case.

[30] Several courts have recognized the potential applicability of these sections, but have not reached the issue presented by these cases. *See, e.g., British Auto Parts, Inc. v. NLRB*, 405 F.2d 1182, 1184 (9th Cir. 1968) (per curiam), *cert. denied sub nom. Teledyne, Inc. v. NLRB*, 394 U.S. 1012 (1969); *FTC v. Western Gen. Dairies, Inc.*, 432 F. Supp. 31, 34 (N.D. Cal. 1977).

no doubt that subpoena enforcement proceedings fall within the scope of one or all of these broad grants of subject matter jurisdiction.

On its face, each of the provisions is clearly sufficient to confer subpoena enforcement jurisdiction. At its broadest level, the district courts' federal question jurisdiction extends to "all civil actions arising under the Constitution, laws, or treaties of the United States."[31] More specifically, Congress has granted the district courts original jurisdiction "of any civil action or proceeding arising under any Act of Congress regulating commerce."[32] It has also declared, in section 1345, that "[e]xcept as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."[33] The exception to

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[31] 28 U.S.C. § 1331 (Supp. IV 1980). *See generally Gully v. First Nat'l Bank*, 299 U.S. 109 (1936); London, *"Federal Question" Jurisdiction—A Snare and a Delusion*, 57 MICH. L. REV. 835 (1959); Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953).

[32] 28 U.S.C. § 1337(a) (Supp. IV 1980). Courts interpret § 1337 broadly to reach any federal statute for which the commerce clause furnishes the predicate; "[i]ndeed a statute comes within Section 1337 if the commerce power is involved in any significant way as the basis for the statute." 13 C. Wright, A Miller & E. Cooper, *supra*, at § 3574; *see Murphy v. Colonial Fed. Sav. & Loan Ass'n*, 388 F.2d 609, 614-15 (2d Cir. 1967); *Imm v. Union R.R.*, 289 F.2d 858, 860 (3d Cir.), *cert. denied*, 368 U.S. 833 (1961). We think that the DOEOA is such a statute.

[33] 28 U.S.C. § 1345 (1976). By incorporating the first and second paragraphs of § 9 of the FTC Act, § 645 of the DOEOA expressly authorizes the Secretary of the DOE to institute subpoena enforcement proceedings in any court of competent jurisdiction. *See* note 16 *supra*.

section 1345 is interpreted narrowly,[24] and the section's language evinces Congress' intent to confer jurisdiction over any form of action that the United States might initiate.[25] Standing alone, section 1345 is plainly sufficient to provide jurisdiction in these cases: "Although other special jurisdictional provisions may also give the district court jurisdiction over some cases brought by the United States, the government *need not have any specific statutory authorization for a particular action* inasmuch as general jurisdiction is conferred by Section 1345."[26]

Our research, moreover, has uncovered no evidence that subpoena enforcement actions, which fall within the plain meaning of sections 1331, 1337(a), and 1345, cannot be brought under those provisions. In fact, the cases suggest precisely the opposite conclusion. In *United States v. Lasco Industries, Division of Phillips Industries*, 531 F. Supp. 256 (N.D. Tex. 1981), for example, the United States sought judicial enforcement of a subpoena duces tecum issued by the Director of the National

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[24] *See Brennan v. Buckeye Indus., Inc.*, 374 F. Supp. 1350, 1353 (S.D. Ga. 1974) (emphasis added):

> Unless legislation should expressly provide that jurisdiction of a district court is limited by the special jurisdiction provisions of an Act, the right of the United States to sue under § 1337 or § 1345 is not affected. *The United States may lawfully maintain suits in its own courts to prevent interference with the means it adopts to exercise its powers of government and to carry into effect its policies.*

[25] *Compare* 28 U.S.C. § 1345 (1976) ("actions, suits or proceedings") *with* 28 U.S.C. § 1331 (Supp. IV 1980) ("actions") *and* 28 U.S.C. § 1337(a) (Supp. IV 1980) ("action or proceedings"). This assumes, of course, that the United States has a sufficient interest in maintaining the suit. *See United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1883); 14 C. WRIGHT, A. MILLER & E. COOPER, *supra*, at § 3651.

[26] 14 C. WRIGHT, A. MILLER & E. COOPER, *supra*, at § 3651 (footnote omitted) (emphasis added).

Institute for Occupational Safety and Health. Although the court rejected respondent's argument that 29 U.S.C. § 657(b) (1976) could not provide jurisdiction, it also pointed out that jurisdiction would lie under section 1345 if section 657(b) proved insufficient. *Id.* at 260-61. *Federal Maritime Commission v. New York Terminal Conference*, 262 F. Supp. 225 (S.D.N.Y. 1966), *aff'd*, 373 F.2d 424 (2d Cir. 1967), involved a similar petition for enforcement of subpoenas issued by the Commission on the application of its hearing counsel. Even if section 27 of the Shipping Act did not confer jurisdiction, the court concluded, the case was properly before it under section 1345. *Id.* at 230. Although this holding is weakened by the court's assertion of an alternative basis of jurisdiction, *id.* at 231, the decision nevertheless strongly supports the proposition that section 1345 provides jurisdiction for judicial enforcement of DOE subpoenas.[37]

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[37] Several other cases involving subpoena enforcement and the production of records are also relevant. In *NLRB v. British Auto Parts, Inc.*, 266 F. Supp. 368 (C.D. Cal. 1967), *aff'd*, 405 F.2d 1182 (9th Cir. 1968) (per curiam), *cert. denied sub nom. Teledyne, Inc. v. NLRB*, 394 U.S. 1012 (1969), the Board sought an order compelling the production of records. Although the court held the Board's subpoena enforceable under 28 U.S.C. § 161, it also would have issued an injunction enforcing the Board's *Excelsior* rule. Its language is instructive:

> District Courts have jurisdiction under 28 U.S.C. § 1337 "of all suits and proceedings regulating commerce." This statutory provision vests the district courts with jurisdiction to aid administrative agencies in carrying out their congressionally authorized powers and duties, *despite the absence of any express grant of district court jurisdiction under the agencies' respective enabling acts.*

Id. at 374 (emphasis added) (citing many cases). *See also United States v. Hankins*, 581 F.2d 431, 438 n.11 (5th Cir. 1978) (jurisdiction to enforce an IRS summons grounded in 26 U.S.C. § 7402(a) and § 1345), *cert. denied*, 440 U.S. 909 (1979); *NLRB v. Hanes Hosiery Div.—Hanes Corp.*, 384 F.2d 188, 191-92 (4th Cir. 1967) (same as *British Auto Parts*),

We conclude, therefore, that sections 1331, 1337(a), and 1345 provide subject matter jurisdiction for proceedings to enforce subpoenas issued under section 645 of the DOEOA by the Secretary of Energy or his duly authorized agents.

2. *Extraterritorial Service of Process*

We recognize, of course, that the general jurisdictional grants of sections 1331, 1337(a), and 1345 are, in some

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cert. denied, 390 U.S. 950 (1968); *United States v. Nanlo, Inc.*, 519 F. Supp. 723, 724-25 (D. Mass. 1981) (jurisdiction to enforce FTC order requiring company to file financial report grounded in 15 U.S.C. §§ 49 and 50 and §§ 1337 and 1345).

The scope of §§ 1337 and 1345 is also illustrated by cases involving administrative inspections. In *Marshall v. Gibson's Prods., Inc.*, 584 F.2d 668 (5th Cir. 1978), for example, the Secretary of Labor sued to enjoin an employer to submit to warrantless inspections. Although the court ultimately concluded that the Occupational Safety and Health Act impliedly precluded jurisdiction for injunctive actions brought by the Secretary to exercise his authority under § 8(a) of the Act, its reading of § 1345 is consistent with ours. *See id.* at 674, 676 & n.10. *See also State Fair v. United States Consumer Prod. Safety Comm'n*, 481 F. Supp. 1070, 1074 & n.6 (N.D. Tex. 1979) (§ 1345 confers jurisdiction in action by CPSC for administrative inspection warrant; agency is expressly authorized to sue and court thus has jurisdiction to issue warrant), *modified*, 650 F.2d 1324 (5th Cir.), *vacated as moot*, 454 U.S. 1026 (1981); *Marshall v. Huffhines Steel Co.*, 478 F. Supp. 986, 988 (N.D. Tex. 1979) (29 U.S.C. § 657(a) empowers OSHA to inspect but makes no explicit provision for issuance of warrants; § 1337 provides explicit jurisdictional grant that is only implicit in § 657(a)); *Marshall v. Weyerhaeuser Co.*, 456 F. Supp. 474, 477 (D.N.J. 1978) (§§ 1337 and 1345 confer jurisdiction on district court in action by Secretary of Labor for search warrant); *Dunlop v. Burlington N.R.R.*, 395 F. Supp. 203, 204 (D. Mont. 1975) (Secretary of Labor may seek order authorizing OSHA inspections under §§ 1337 and 1345, but respondent exempt); *Brennan v. Buckeye Indus., Inc.*, 374 F. Supp. 1350, 1352-53 (S.D. Ga. 1974) (§§ 1337 and 1345 provide jurisdiction in action seeking order requiring company to submit to inspection).

respects, less generous than is the provision found in the third paragraph of section 9 of the FTC Act. Section 9 allows a district court where the inquiry is being carried on to enforce *all* subpoenas issued as part of that inquiry; in a nationwide investigation the FTC may seek enforcement of all subpoenas in a single district court.[38] Because of the limitations on extraterritorial service of process, FED. R. CIV. P. 4(f); *see* Part II.A.2. *supra*, the alternative jurisdictional provisions available to the DOE will not provide it the same convenience for enforcement. Under those alternative provisions, the Government may be required to petition for enforcement of DOE subpoenas in several district courts, wherever the reluctant subpoena respondents might be found.

The Government has suggested that its interest in convenient enforcement of DOE investigatory subpoenas is an adequate policy justification for a broad construction of section 645. Admittedly, it does appear that Congress intended section 645 to augment the DOE's subpoena *issuance* authority. But the Government has pointed to nothing in either the statute or the legislative history that supports a policy argument in favor of *enforcement* of all subpoenas in a single district court,[39] and we surely will not infer that Congress intended to confer extraterritorial subpoena enforcement jurisdiction on the sole basis of the agency's view of appropriate policy.[40] "Jurisdictional statutes are to be construed

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[38] *See FTC v. Browning*, 435 F.2d at 100; *accord FTC v. Jim Walter Corp.*, 651 F.2d 251, 254-55 (5th Cir. 1981).

[39] *See Robertson v. Railroad Labor Bd.*, 268 U.S. at 626:

> But no reason is suggested why Congress should have wished to compel every person summoned either to obey the Board's administrative order without question, or to litigate his right to refuse to do so in such district, however remote from his home or temporary residence, as the Board might select.

[40] We are particularly reluctant to do so in light of the fact that the other statutes administered by the DOE do not appear

'with precision and with fidelity to the terms by which Congress has expressed its wishes.'" *Palmore v. United States*, 411 U.S. 389, 396 (1973) (quoting *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968)). We are bound to enforce section 645 as written. If the Government prefers a more convenient approach to subpoena enforcement, it must seek the necessary jurisdictional grant from Congress, not from the courts.

III. Conclusion

For the reasons set forth above, we hold that section 645 of the DOEOA, 42 U.S.C. § 7255 (Supp. IV 1980), does not incorporate the third paragraph of section 9 of the FTC Act, 15 U.S.C. § 49 (1976). Accordingly, we hold that section 645 does not confer on federal district courts either subject matter jurisdiction or the power of extraterritorial service of process in DOE subpoena enforcement proceedings. We reverse the District Court's holdings to the contrary, and we vacate the District Court's orders enforcing the DOE subpoenas directed at Hill, Pinkerton, Juren, and Cromey.

Although we reject the asserted basis of jurisdiction for the District Court orders, we do not direct dismissal of the enforcement petitions. In each of these cases, the Government asserted section 13(e) of the FEAA, 15 U.S.C. § 772(e) (1976), and section 206 of the ESA, 12 U.S.C. § 1904 note (1976) (incorporated by section 5(a) of the EPAA, 15 U.S.C. § 754(a)(1) (1976)), as alternative bases for the District Court's jurisdiction.

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to confer extraterritorial subpoena enforcement jurisdiction on the district courts. *See* § 206 of the ESA, 12 U.S.C. § 1904 note (1976) (incorporated by 15 U.S.C. § 754(a)(1) (1976)) (authorizing enforcement actions only in "any district in which such person is found"); 15 U.S.C. § 772(e) (1976) (authorizing enforcement actions in "[a]ny appropriate United States district court"—a phrase that should be interpreted as "court of competent jurisdiction," *see* note 16 *supra*).

After concluding that it had jurisdiction under section 645, the District Court found it "unnecessary to consider whether the above-referenced sections of the [ESA] and the [FEAA] confer enforcement jurisdiction upon this Court." *United States v. Hill*, 525 F. Supp. at 624; *see* Transcript of February 16, 1982 Hearing at 41-42, *reprinted in* Juren Appendix at 21-22. Because we reverse the District Court's holdings on section 645, it is now necessary to consider these alternative jurisdictional grants.

The Government has not suggested that the other provisions on which it relied confer extraterritorial enforcement jurisdiction, and our reading of these provisions would lead us carefully to scrutinize any conclusion that they do. *See* note 40 *supra*. But because the parties have not fully briefed the question, we decline to resolve it at this time. Instead, we remand the cases to the District Court. On remand, the parties will have the opportunity to address these and other related issues. In addition, the District Court will have an opportunity, as necessary, fully to consider questions pertaining to subject matter jurisdiction, personal jurisdiction, and venue under these alternative subpoena enforcement provisions.

So ordered.

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CLERK

No. 82-739

In the Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS JUREN AND EDWARD W. CROMEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Department of Energy properly issued subpoenas to petitioners in connection with an investigation of sales and exchanges of crude oil and refined products by petitioners' company.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 687 F.2d 493. The oral opinion of the district court (Pet. App. 16a-17a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27a) was entered on September 9, 1982. A petition for rehearing was denied on September 28, 1982 (Pet. App. 28a). The petition for a writ of certiorari was filed on October 28, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, incorporated by Section 5(a)(1)(A) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1)(A).

STATEMENT

Petitioners are officers of Tesoro Petroleum Corporation, a Texas corporation that engages in the production and refining of crude oil. The Department of Energy ("DOE") is charged by statute with enforcing the provisions of the Emergency Petroleum Allocation Act of 1973 ("EPAA") and regulations promulgated thereunder.[1] In July 1981, each petitioner was served with a subpoena ad testificandum, the purpose of which was to obtain information relating to a DOE investigation of sales and exchanges of crude oil and refined products by Tesoro and certain other firms during 1976 and 1977 (Pet. App. 32a-33a). Petitioners refused to comply voluntarily with the subpoenas.

DOE petitioned the United States District Court for the District of Columbia for enforcement of the subpoenas. Petitioners opposed enforcement, contending that (1) the district court lacked jurisdiction to enforce the subpoenas; (2) DOE had issued them for the purpose of obtaining information for use in a criminal proceeding; and (3) enforcement of the subpoenas would violate petitioners' Fifth Amendment privilege against compelled self-incrimination. DOE responded by submitting affidavits that indicated, *inter alia*, that (1) there were valid civil purposes for issuance of the subpoenas; (2) DOE had made no criminal referral to the Department of Justice of the matter under investigation; and (3) there had been no institutional determination to refer the case for criminal investigation (Pet.

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[1]On January 28, 1981, President Reagan removed price controls for crude oil and refined petroleum products. Exec. Order No. 12287, 46 Fed. Reg. 9909. On September 30, 1981, the authority to promulgate regulations and issue orders under the EPAA expired; however, the expiration does not affect actions or proceedings pending on that date or actions or proceedings based on acts committed prior to that date. 15 U.S.C. 760g.

App. 2a, 17a; R-198 to R-204).[2] On the basis of the DOE affidavits, the district court enforced the subpoenas and denied petitioners' request for discovery concerning DOE's purpose in issuing the subpoenas (Pet. App. 16a-19a).

Petitioners pursued appeals in both the United States Court of Appeals for the District of Columbia Circuit and the Temporary Emergency Court of Appeals ("TECA").[3] On July 13, 1982, the District of Columbia Circuit issued a decision rejecting peti tioners' contention that the district court lacked jurisdiction to enforce the subpoenas under Section 645 of the Department of Energy Organization Act

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[2]"R" refers to the record in the court of appeals, a copy of which petitioners have lodged with the Clerk of the Court (Pet. 4 n.3).

[3]The government contended that all of the issues raised by petitioners in their appeals were within the exclusive jurisdiction of TECA, since the subpoenas were issued as part of an investigation of possible violations of regulations promulgated under the EPAA. TECA's opinion does not refer explicitly to the threshold issue of jurisdiction, and petitioners do not present that issue as a question for review by this Court. The government continues to take the position that TECA, rather than the District of Columbia Circuit, had exclusive jurisdiction to decide all issues raised on appeal.

While the appeals were pending, petitioners filed a Fed. R. Civ. P. 60(b) motion, alleging the existence of newly-discovered evidence (Pet. App. 25a-26a). That evidence consisted of a memorandum written in March 1979 as a record of a meeting between DOE attorneys and attorneys in the Criminal Division of the Department of Justice concerning a different DOE investigation of Tesoro that had been pending in 1979. The memorandum of the meeting indicated that no decision had been made to refer that matter to the Justice Department for criminal prosecution (*ibid.*). At the hearing on the Rule 60(b) motion, DOE introduced affidavits that established that (1) the particular investigation referred to in the March 1979 memorandum had been closed without a referral to the Department of Justice, and (2) that investigation involved different facts than, and was conducted separately from, the investigation for which petitioners' subpoenas had been issued (Pet. App. 25a-26a). On the basis of these uncontroverted facts, the district court denied petitioners' motion for a new hearing (*ibid.*).

("DOEOA"), 42 U.S.C. (Supp. IV) 7255 (Pet. App. 4a-9a).[4] The District of Columbia Circuit declined to rule on petitioners' claims that the subpoenas were issued for an unlawful purpose and that their enforcement would violate petitioners' Fifth Amendment privilege against self-incrimination, on the ground that TECA had exclusive jurisdiction of these issues (Pet. App. 8a).

On September 9, 1982, TECA affirmed (Pet. App. 1a-3a) the district court's orders enforcing the subpoenas and rejecting petitioners' motions for discovery. TECA concluded that petitioners had "presented no evidence that DOE acted improperly" (*id.* at 2a). Subsequently, on October 5, 1982, the District of Columbia Circuit panel granted a petition for rehearing filed by petitioners and vacated its July 13 order. On November 9, after the petition for a writ of certiorari in the present case had been filed, the District of Columbia Circuit panel issued a new opinion in which it reversed its earlier conclusion that the district court had jurisdiction to enforce the subpoenas under Section 645 of the DOEOA. In its new opinion the panel stated that Section 645 "does not confer on federal district courts either subject matter jurisdiction or the power of extraterritorial service of process in DOE subpoena enforcement proceedings." *United States* v. *Hill*, 694 F.2d 258, 270 (D.C. Cir. 1982), rehearing denied (Jan. 14, 1983). The panel remanded the case for consideration of several alternative bases for the district court's jurisdiction, although it expressed the view that none of these alternative provisions conferred extraterritorial enforcement jurisdiction (*ibid.*).

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[4]The District of Columbia Circuit consolidated petitioners' appeals with those of Hill and Pinkerton, officers of the Hill Petroleum Company, who were also contesting subpoenas issued in connection with the DOE investigation.

ARGUMENT

1. The decision of the Temporary Emergency Court of Appeals is clearly correct, does not conflict with the ruling of any other court, and does not warrant further review.

a. The question presented for review by this Court (Pet. i) does not include a challenge to the factual findings of the courts below. However, much of the petition consists of an attempt to establish that, contrary to the conclusions of both the district court and TECA, DOE in fact had some improper criminal purpose in issuing the subpoenas. Thus, petitioners protest that there are "strong indications" that the subpoenas were issued solely for a criminal purpose (Pet. 13) and that there was at least sufficient evidence to warrant further inquiry (Pet. 16). But TECA specifically concluded that petitioners had presented "no evidence that DOE acted improperly" (Pet. App. 2a) and that petitioners had offered only "[u]nsupported allegations of bad faith and improper purpose" (*id.* at 3a).[5] TECA noted that both

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[5]The affidavit of Jeffrey R. Whieldon (R-198 to R-201), dated Feb. 11, 1982, submitted by DOE in the district court in response to petitioners' challenges to enforcement of the subpoenas and cited in the district court's oral opinion (Pet. App. 16a-17a), states that the subpoenas were issued in order to obtain information for a number of civil purposes, as well as to aid in the determination whether to make a referral to the Department of Justice for criminal investigation (paras. 15 and 6, R-200 and R-199); that there had been no "institutional determination" to make a referral to the Department of Justice at the time the subpoenas were issued (para. 16, R-201); and that the subpoenas were issued in futherance of an investigation "the good faith purpose of which was to determine whether there had been either civil or possible willful violations of the DOE regulations, or both" (*ibid.*). See also the affidavit of Jerome Wiener (R-202 to R-204), dated Feb. 11, 1982. In addition, affidavits by DOE officials filed in response to petitioners' Rule 60(b) motion stated that the "Tesoro/Young investigation," on which petitioners place considerable weight, was entirely separate from the investigation at issue in this case and in fact has been closed (Pet. App. 25a-26a; Whieldon affidavit of May 20, 1982; Sulton affidavit of May 20, 1982). TECA concluded that petitioners had presented "no evidence challenging the accuracy of the statements made in the affidavits" (Pet. App. 2a).

Judge Gesell and Judge Flannery on rehearing "found that [petitioners] had failed to meet the heavy burden of showing the extreme circumstances that would justify inquiry into the propriety of the subpoenas" (*id.* at 2a-3a).[6] Since petitioners have not sought review of the factual findings of the courts below, they should not be permitted to rewrite those findings at this stage. In any event, the concurrent findings of the two lower courts do not warrant review by this Court. See *Rogers* v. *Lodge*, No. 80-2100 (July 1, 1982), slip op. 10; *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

b. Petitioners contend that the courts below gave undue consideration to whether there had been a decision to make a referral to the Department of Justice and thus used an incorrect legal standard in reaching the conclusion that DOE did not issue the subpoenas for an improper purpose. Petitioners rely primarily on *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), a case involving the authority of the Internal Revenue Service to issue summonses, in support of their argument that the critical consideration is not whether a decision has been made to make a referral, but rather whether there has been an " 'institutional commitment' to conduct a purely criminal investigation" (Pet. 16). In fact, *LaSalle* itself stresses the importance of the step of referral: "[W]e decline to impose the prophylactic restraint on the summons authority any earlier than at the [point in time of] recommendation to the Department of Justice." 437 U.S. at 313 n.15. The Court concluded that earlier imposition of a ban on use of the summons authority would "unnecessarily hamstring the performance" of the civil functions of the IRS (*ibid.*). The Court stated, however, that it would not countenance a delay in referring a

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[6]Of course, "those opposing enforcement of a summons do bear the burden to disprove the actual existence of a valid civil * * * purpose." *United States* v. *LaSalle National Bank*, 437 U.S. 298, 316 (1978).

case to the Justice Department "when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution" and that the IRS should not "become an information-gathering agency for other departments" (437 U.S. at 316-317).

Assuming arguendo that the Court's statements in *LaSalle* apply to subpoenas issued by DOE,[7] the courts below properly applied that test, citing the affidavits in which DOE officials stated that there had been no institutional

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[7]As the Court noted in *LaSalle*, the validity of summonses and subpoenas "depend[s] ultimately on whether they were among those authorized by Congress," 437 U.S. at 307. See also *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1378-1379 (D.C. Cir.) (en banc), cert. denied, 449 U.S. 993 (1980). DOE has broader statutory authority in this respect than the authority of the IRS under 26 U.S.C. 7602, at the time of the decision in *LaSalle*. See, *e.g.*, Section 13(d) and (e)(1) of the Federal Energy Administration Act of 1974, 15 U.S.C. 772(d) and (e)(1) (authorizing DOE to obtain, by means of subpoenas or otherwise, information necessary for a designated official to perform his functions); Section 206 of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, (referring to subpoena power "for any purpose related to this title"), which is incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1), as amended; Section 645 of the Department of Energy Organization Act, 42 U.S.C. (Supp. IV) 7255 (referring to subpoena power for "the purpose of carrying out the provisions of this chapter"). Thus, it is questionable whether all of the Court's statements in *LaSalle* about limitations on the IRS would necessarily apply to DOE.

Congress recently overruled in part the restrictions imposed on the IRS by *LaSalle* by amending 26 U.S.C. 7602. See Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, Section 333(a), 96 Stat. 622 (providing that the purpose of issuing summons may include inquiry into any offense connected with the administration or enforcement of the internal revenue laws, and that issuance of summons is prohibited during the time a Justice Department referral is in effect). See also S. Rep. No. 97-494, 97th Cong., 2d Sess. 285-287 (1982).

commitment to refer the investigation to the Justice Department and concluding that petitioners had failed to demonstrate that DOE had an improper purpose. See p. 5 n.5. In any event, petitioners cannot succeed even under the standard they advocate — whether there has been an institutional commitment to make a purely criminal investigation — since the uncontroverted affidavits presented by DOE establish that the subpoenas issued to petitioners had various civil purposes, as well as the purpose of aiding in the determination whether to refer the matter to the Department of Justice for criminal investigation. The civil purposes for which information was sought include determination whether to commence a civil enforcement proceeding and whether to seek civil penalties in such a proceeding, collection of evidence to support allegations in a civil enforcement proceeding, determination of an appropriate civil settlement amount for violations of DOE regulations, and determination whether a portion of a civil settlement should be denominated a penalty (Whieldon affidavit of Feb. 11, 1982, paras. 6 and 15, R-198 to R-200; Wiener affidavit of Feb. 11, 1982, para. 7, R-203).

2. As noted above, a panel of the District of Columbia Circuit, in a decision issued several months after the TECA decision that petitioners challenge, reversed its earlier conclusion that the district court had jurisdiction under Section 645 of the DOEOA, 42 U.S.C. (Supp. IV) 7255, to enforce the subpoenas at issue. *United States* v. *Hill*, 694 F.2d 258 (D.C. Cir. 1982), rehearing denied (Jan. 14, 1983). The government has not yet determined whether to petition for a writ of certiorari in that case.

Whether or not the government decides to file a petition in *Hill*, it is clear that the sole question raised by petitioners in this case does not warrant plenary review. Accordingly,

the Court should deny the petition for a writ of certiorari.[8] In the alternative, the Court may wish to hold the petition in this case until the government reaches a determination whether to seek certiorari in *Hill*. Should the Court decide to hold the petition, we will file a supplemental memorandum advising the Court of our decision in *Hill*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1983

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[8]The petition in this case should be denied even if the government decides not to seek a writ of certiorari in *Hill*. Petitioners contend (Pet. 11-12) that this Court should vacate the decision of the TECA and remand the case for consideration in light of the jurisdictional ruling of the District of Columbia Circuit in *Hill*. But petitioners did not present the issue of the district court's jurisdiction as a question for review by this Court. See Sup. Ct. R. 21.1(a). Assuming that petitioners could appropriately challenge the TECA decision on the basis of *Hill*, such a challenge would more properly be made by means of a collateral attack on the TECA decision at some later time, in the event that the TECA decision affects petitioners' substantial rights. In this regard, we note that, if the government does not obtain review of *Hill* by this Court, it does not intend to pursue further its efforts to enforce the subpoenas against petitioners in the United States District Court for the District of Columbia. Accordingly, there is no reason for this Court now to become involved in determining the validity of the TECA judgment when the question presented by the petition is not otherwise worthy of review.

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REPLY BRIEF FOR THE PETITIONERS

The government has given this Court misguided advice, both with respect to the procedure to be followed in disposing of the pending petition and with respect to the merits of petitioners' objection to the Department of Energy's subpoenas. We address first the procedural deficiencies in the government's position, and then turn to the question of DOE's purpose in issuing the disputed subpoenas.

1. The Court should hold the present petition pending the government's decision whether to seek further review on the question of the district court's jurisdiction, and, if the government decides to seek certiorari, pending the disposition of the government's petition. The Court should not act separately on the substantive and jurisdictional issues involved in this case, as the government now suggests. On the contrary, if the D.C. Circuit's holding that the district court lacked jurisdiction remains undisturbed, this Court should grant the present petition and summarily vacate the decision of the Temporary

Emergency Court of Appeals. On the other hand, if the government seeks review of the D.C. Circuit's ruling, and the Court is inclined to grant review, then it should grant the present petition as well, so that both aspects of the case can be reviewed together.

Until the filing of the government's brief in opposition on March 7, 1983, the government apparently agreed with petitioners' view that the disposition of the present petition should await the resolution of the question of the district court's jurisdiction. Three times the government sought 30-day extensions of the time within which to respond to the pending petition, and three times the government justified its request by reference to the appeal in the D.C. Circuit. See letters from the Solicitor General to the Clerk of this Court, dated December 2, 1982; January 3, 1983; and February 1, 1983. Indeed, the government's third request for an extension of time was based on the explicit representation that "[t]he government will be better able to respond to the petition in No. 82-739 after a decision whether or not to petition for a writ of certiorari in the District of Columbia Circuit case has been made."

Now, suddenly, although the government has not yet decided whether to seek review of the D.C. Circuit's ruling, it has urged this Court immediately to deny the pending petition. The Court should reject the government's precipitate invitation.

The unusual procedural posture of this case is a product of the bifurcated appellate jurisdiction created by Congress in Section 211(b) of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. 1904 note, incorporated by reference in Section 5 of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. 754. As interpreted by the TECA and by other federal courts of appeals, the TECA's jurisdiction under this statute is a so-called "issue" jurisdiction that depends on whether the particular question in dispute involves

some aspect of the ESA or the EPAA. See Pet. 8-9 n.4, and authorities there cited.

In the present case, the district court erroneously concluded that it had jurisdiction over the Department of Energy's subpoena enforcement actions under Section 645 of the Department of Energy Organization Act ("DOEOA"), 42 U.S.C. (Supp. III) 7255. The D.C. Circuit reversed that decision, and the TECA did not address the question of the district court's jurisdiction. Petitioners believed that, because the jurisdictional issue turned on the proper interpretation of Section 645 of the DOEOA, appellate jurisdiction over that issue lay only in the D.C. Circuit, not in the TECA. The D.C. Circuit agreed. See *United States* v. *Hill*, 694 F.2d 258, 260 n.5 (D.C. Cir. 1982).

In an ordinary case, a district court judgment is appealed to only one appellate court. If that court holds that the distict court lacked jurisdiction, the case goes no further. Indeed, a court of appeals is not empowered to address the merits of the case in such circumstances. See, *e.g.*, *United States* v. *Corrick*, 298 U.S. 435, 440 (1936); *Rock Island Millwork Co.* v. *Hedges-Gough Lumber Co.*, 337 F.2d 24, 27 (8th Cir. 1964) ("if the court tries a case where jurisdiction is lacking the jurisdiction of the appellate court on review is limited to correcting the error of the trial court in entertaining the action"); *Warren G. Kleban Engineering Corp.* v. *Caldwell*, 490 F.2d 800, 803 n.2 (5th Cir. 1974).

Here, by contrast, the question of the district court's jurisdiction was considered by a court of appeals other than the one that considered the propriety of DOE's subponeas. As a consequence, an appellate decision on the merits has been rendered in circumstances where no such ruling would ordinarily be made. The TECA's decision would not exist, but for the peculiar scheme of appellate jurisdiction created by the ESA and the EPAA.

In this situation, the TECA decision should be vacated, unless the D.C. Circuit's ruling is overturned on further review. Petitioners should not be required to face any risk whatsoever of adverse effects from the TECA decision, when the government is the party responsible for bringing these actions in an inappropriate forum that lacked jurisdiction from the outset.

The government now advances the gratuitous and ill-conceived suggestion that petitioners' challenge to the TECA decision could "more properly be made by means of a collateral attack * * * at some later time, in the event that the TECA decision affects petitioners' substantial rights" (Br. in Opp. 9 n.8). The government does not suggest any procedure by which petitioners could initiate such an attack. Apparently, the government means to contend that petitioners should be compelled to await further DOE subpoena enforcement actions, in which proceedings petitioners would be free to oppose any government effort to rely on the TECA decision now before this Court. That is precisely the predicament that petitioners seek to avoid. The TECA decision is properly before this Court on direct review, and petitioners cannot fairly be forced to deal at some later date with a decision that should not have been rendered in the first place.

Nor is there any significance to the government's observation that "petitioners did not present the issue of the district court's jurisdiction as a question for review by this Court" (Br. in Opp. 9 n.8). That question was not addressed by the TECA and, in petitioners' view, was not within the TECA's jurisdiction to decide. Accordingly, petitioners had no occasion to raise the issue in their petition for certiorari. Moreover, the question has been resolved in petitioners' favor by the D.C. Circuit, and unless that decision is overturned it is the law of the

case. This Court has frequently acknowledged that the jurisdiction of the courts below is an appropriate subject for inquiry here, even if no party has specifically called the matter to the Court's attention. See, *e.g.*, *Mitchell* v. *Maurer*, 293 U.S. 237, 241-244 (1934); *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 588 (1939); *Philbrook* v. *Glodgett*, 421 U.S. 707, 721 (1975). Especially in view of this principle, there is surely no impediment to petitioners' contention that the decision of the TECA should be vacated because of the district court's lack of jurisdiction.*

2. If the government decides to seek review of the D.C. Circuit's decision, and if the Court is inclined to grant review, it should at that time also grant review of the present petition, so that the jurisdictional and substantive issues raised by the DOE subpoena enforcement actions can be considered together.

The government has responded in two ways to petitioners' substantive challenge to the propriety of the subpoenas. First, it has recast the question presented by the petition and has attempted to create the impression that petitioners seek review of factual findings by the courts below. Second, it has misinterpreted the record in such a way as to read into the affidavits of DOE officials representations that those officials in fact appear to have

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* The petition for a writ of certiorari was filed before the D.C. Circuit's decision on rehearing. At that time, petitioners urged that, if the D.C. Circuit were to rule that the district court lacked jurisdiction, this Court should vacate the TECA decision and remand for reconsideration in light of the D.C. Circuit's ruling. That recommendation was not intended to suggest that the TECA itself should consider whether it agreed with the D.C. Circuit's jurisdictional ruling. Rather, the thought was that, in view of the D.C. Circuit's ruling, the TECA would conclude that there was no need to reach the question of the subpoenas' validity. On reflection, it is clear that the appropriate result can be achieved simply through vacating the TECA decision. No remand is necessary, and therefore petitioners have modified their requested disposition of the current petition.

assiduously avoided making, *i.e.*, that the DOE subpoenas did actually—as opposed to hypothetically—have a bona fide civil purpose. Neither strategem should be permitted to divert the Court's attention from the important legal question presented by the petition.

a. The district court and the TECA held that the DOE subpoenas should be enforced because "DOE had made no determination to refer the case [to the Department of Justice] for criminal investigation" (Pet. App. 2a; see also Pet. App. 17a). Petitioners maintain that, under the principles set forth in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), this fact alone is not sufficient to establish the lawfulness of the subpoenas, and that therefore the decision below is fundamentally flawed.

Petitioners believe that the DOE subpoenas are unlawful because they were issued solely for the purpose of advancing a criminal investigation. The TECA's conclusion that petitioners did not make an adequate showing of improper purpose was predicated on the court's erroneous belief that, in order to establish an improper purpose, petitioners were required to prove that DOE had decided to refer the case to the Department of Justice. To demonstrate that in the absence of this erroneous legal standard, they would have had a substantial likelihood of success (or, at least, obtaining discovery), petitioners summarized the reasons for their belief regarding the subpoenas' purpose (Pet. 3-5, 7-9, 13-15). Contrary to the government's intimation (Br. in Opp. 5), petitioners' challenge the legal standard applied below, not any factual findings. Indeed, as far as we can determine, neither the district court nor the TECA made any such findings, apart from their conclusions regarding referral to the Department of Justice; the courts simply announced their legal judgments.

b. Even more egregious than the government's unilateral reformation of the question presented by petitioners are the government's inflated claims for the

affidavits of DOE officials submitted in support of the challenged subpoenas. The simple fact is that the affidavits do not say what the government seems to think they say.

The government relies (Br. in Opp. 8) on two affidavits, one by Jeffrey R. Whieldon, Deputy Solicitor of the Economic Regulatory Administration (ERA) in DOE (R-198 to R-201), and one by Jerome Wiener, Director of the ERA's Office of Special Investigations (R-202 to R-204). Neither affidavit contains a plain statement that the challenged subpoenas actually had a civil purpose.

Paragraph 6 of the Whieldon affidavit states that "[i]nformation obtained in the course of a special investigation may be used for many purposes" (R-198). It then lists eight possible purposes for which such information may be used (R-199). One of these purposes is "determining whether to refer the subject firm to the Department of Justice for criminal prosecution" (*ibid.*). Paragraph 15 of the Whieldon affidavit then says that, in issuing the subpoenas to petitioners, it was Mr. Whieldon's purpose "to utilize information gained therefrom in accordance with paragraph 6 above" (R-200). The affidavit does not say that DOE issued the subpoenas for all or even some of the civil purposes listed in Paragraph 6. It simply says that information obtained from the subpoenas would be used "in accordance with paragraph 6." This statement would be true even if, as petitioners contend, the information was to be used solely for "determining whether to refer the subject firm to the Department of Justice for criminal prosecution." Whieldon's affidavit is thus completely consistent with petitioners' belief that the DOE subpoenas were issued solely for a criminal purpose.

Paragraph 7 of Wiener's affidavit is identical to Paragraph 6 of Whieldon's. It too lists many purposes for which "[i]nformation obtained in the course of a special investigation may be used" (R-204), but it never once says that DOE intended to use any of the information sought in the disputed subpoenas for a civil purpose.

Ignoring the actual, carefully phrased language of the Whieldon and Wiener affidavits, the government finds in those affidavits representations that they simply do not contain. Notwithstanding this effort to buttress the record, the fact remains that no DOE official has ever represented to any court in any sworn statement that the subpoenas issued to petitioners did in fact have a legitimate civil purpose. Petitioners are convinced that that omission was not inadvertent, and that is why they have sought review of the legal standard applied by the courts below in reviewing the subpoenas' validity.

* * * *

For the foregoing reasons, and for the reasons stated in the petition for a writ of certiorari, the petition should be held pending the government's decision whether to seek review of the D.C. Circuit's ruling and, if a decision is made to seek review, pending the Court's disposition of the government's petition.

If further review of the D.C. Circuit's decision is not sought or is not granted, this petition should be granted and the TECA's judgment summarily vacated.

If further review of the D.C. Circuit's decision is sought and granted, this petition should be granted as well.

Respectfully submitted.

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